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Family Property

by Thomas G. Anderson
and
Michael Karlon

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and the Family Trust

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Michael Karton

A Study Paper
Prepared for the
Law Reform Commission
of British Columbia

October, 1985



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INTRODUCTORY NOTE

When the *Family Relations Act* was introduced in 1978, those parts of it that concerned family property received a mixed reaction. Some saw it as a significant improvement over the prior law. Others saw it as a Pandora's box that would loose a multitude of unexpected and unpredictable ills on society. Experience under the Act would appear to support both points of view to a degree.

Since its inception, the Act has attracted criticism and the Law Reform Commission has been concerned to find ways and means of improving its operation. The first step was to commission this Study Paper. The goal was to produce a document that would provide a relatively detailed description of the operation of the Act, as seen through the jurisprudence it has generated, and to evaluate its operation.

The Study Paper is designed to achieve a number of aims. The first aim is to provide a resource document on which the Law Reform Commission might draw in relation to any, more specific, projects on family property it might undertake in the future. It has already provided the basis for one such study. Earlier this year the Commission issued a Working Paper on Spousal Agreements, which was based on the research for this Study Paper.

A second aim is to make the results of the research done for the Commission available to the courts, the legal profession and the public generally. If this leads to a more sophisticated understanding of, and approach to, the Act, much will have been achieved and the pressure for legislative change may diminish.

This Study Paper was prepared for the Commission by its named authors. While the Commission was consulted throughout, the conclusions and the suggestions for possible change are solely those of the authors. This paper should not be regarded as an expression of the formal views of the Law Reform Commission.

We would like to thank the authors, Messrs. Anderson and Karton, and those who assisted them, for the work they have done.

A.L. Close
Chairman, Law Reform
Commission of British Columbia

AUTHORS' NOTE

Case law under the *Family Relations Act* is extensive, and research for the Study Paper was a substantial undertaking. The initial research for this document was undertaken by Michael Karton, who prepared the first draft of this document in March 1984. In the preparation of the final version of this document, legal developments to October, 1985 have been taken into account. A major portion of this research was conducted by David Goodwin, who also prepared discussion drafts on various issues addressed by the paper and assisted with the final editing. The authors wish to acknowledge the significant contribution he made to completing this Study Paper.

The focus of this Study Paper is the operation of the law governing family property. This examination has led to some consideration of the law governing custody and support obligations. The authors of this Study Paper do not purport to have fully considered the proper operation of the law in areas outside of family property, nor is the discussion of these peripheral areas intended to be definitive.

This Study Paper endeavours to state the law governing family property as it stood on October 1, 1985, although efforts have been made to include developments arising from that time to the date of publication.

BAWTINHEIMER v. BAWTINHEIMER

On November 26, 1985, the British Columbia Court of Appeal handed down its decision in *Bawtinheimer v. Bawtinheimer* (Van. Reg. CA002564). This is an important decision, but was received too late to include in the text of this Study Paper.

In a number of cases, the courts have had to consider marriages in which both spouses had sources of income and conducted their financial affairs separately. Most frequently, courts have acknowledged these arrangements and declined to divide family assets between the spouses. Spouses retained their separate property.

In *Bawtinheimer*, the Court of Appeal held that equal entitlement to family assets is based upon the fact that spouses jointly contribute to the financial well-being of the family. The *Family Relations Act* presumes that joint contributions have been made and the court may not divide property in accordance with the actual contributions made by the spouses. The court may vary equal shares only in exceptional circumstances, and then only having regard to the criteria listed in section 51.

The clear articulation of the philosophy underlying entitlement to family assets under the *Family Relations Act* is welcome. If *Bawtinheimer* is consistently applied, it could lead to the resolution of many issues which are currently unsettled.

Nevertheless, as is discussed in this Study Paper, the various provisions of the *Family Relations Act* are not in keeping with any consistent underlying

philosophy of entitlement to share in family assets. A philosophy of presumed joint contribution, for example, does not justify dividing property owned prior to marriage or acquired during the marriage by gift or inheritance. Nor is it clear how a philosophy of joint contribution relates to the test of use for a family purpose, which determines what property is divisible. Lastly, it is uncertain how this philosophy relates to determining entitlement to business assets (which, even after direct or indirect contribution to them is established, are divided neither equally nor by reference to the value of actual contributions).

The Court of Appeal has adopted a view of the Act consistent with some, but not all of its provisions. It would not be surprising if later decisions adopt a different view, emphasizing those portions of the Act which seem to depend upon proof of actual contribution. As we note in the Study Paper, it is the fundamental underlying clash of philosophies in the Act which has generated much of the confusion surrounding its application.

One last point should be raised concerning the *Bawtinheimer* decision. The arrangements made by the spouses might have been characterized as a tacit agreement to live under a regime of separate property. It should be open to the spouses to determine for themselves how their property is to be divided. It is difficult to identify any policy reason for enforcing a formal agreement that provides for a regime of separate property, and ignoring arrangements which are incontrovertibly in keeping with an informal agreement to that effect.

At various places in this Study Paper, we discuss specific problems that flow from the uncertain philosophy underlying the *Family Relations Act*. The decision of the Court of Appeal in *Bawtinheimer* should be kept in mind when considering the discussion of case law under the *Family Relations Act*, problems under that Act and our suggestions for reform.

TABLE OF CONTENTS

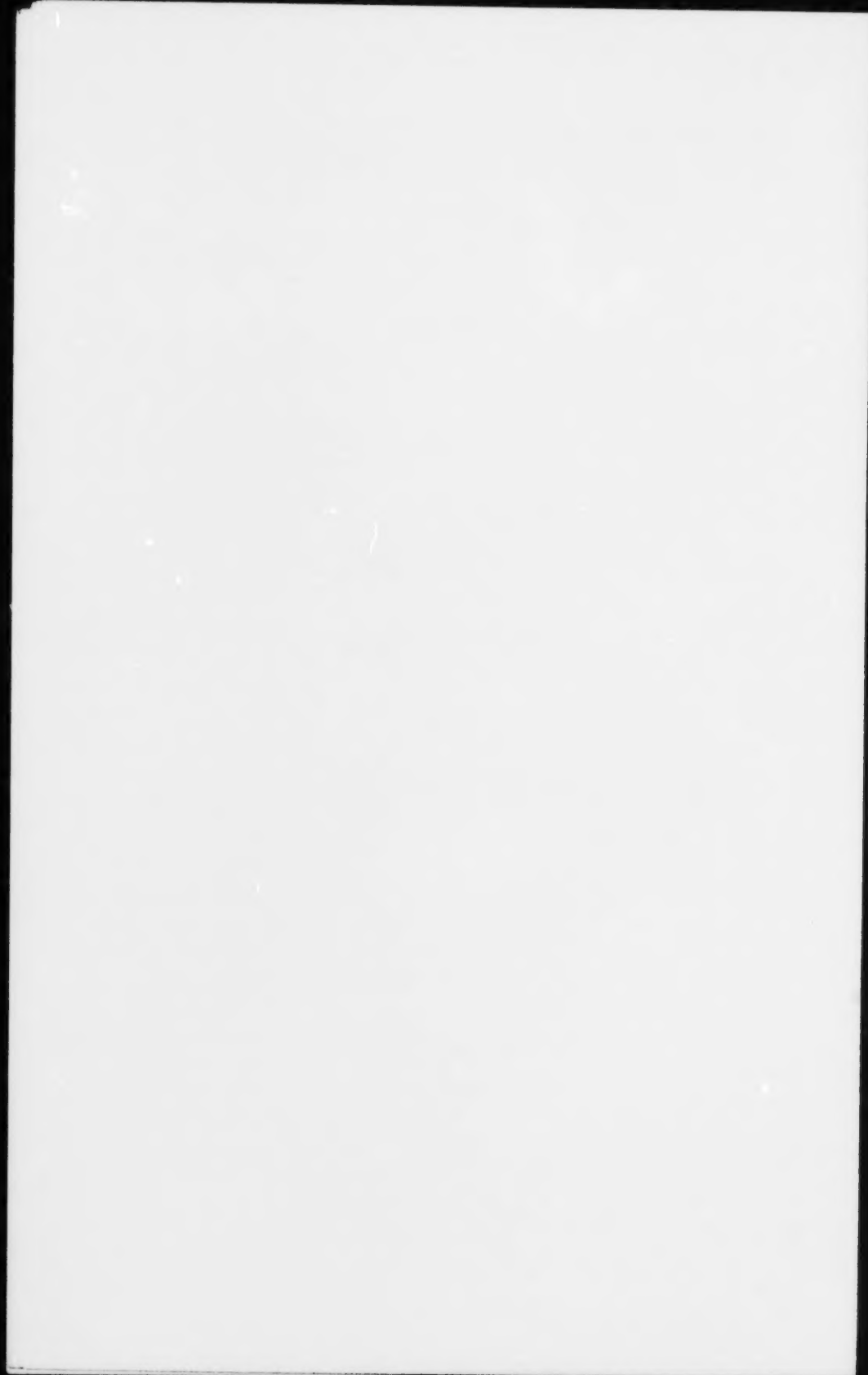
	PAGE
I INTRODUCTION	
A. <i>The Family Relations Act</i>	1
B. The Potential for Litigation	1
C. Recent Developments	1
D. Scope of the Study Paper	2
II SEPARATE PROPERTY, THE CONSTRUCTIVE TRUST AND FAMILY PROPERTY LEGISLATION	
A. Introduction	3
B. <i>Murdoch v. Murdoch</i>	3
C. The Constructive Trust	3
1. Introduction	3
2. Development of the Constructive Trust in England	4
3. The Position in Canada	5
4. <i>Rathwell v. Rathwell</i>	5
5. Summary	7
D. Matrimonial Property Legislation in Canadian Common Law Jurisdictions	7
1. Overview	7
2. Spousal Agreements	7
3. Family Property	8
4. Recent Developments	8
5. Summary	9
III SPOUSAL AGREEMENTS	
A. Agreements Under the <i>Family Relations Act</i>	10
1. Agreements Generally	10
2. Separation Agreements	10
3. What is a Separation Agreement?	10
B. Jurisdiction to Vary Spousal Entitlement to Property	11
C. Sections 51 and 54 of the <i>Family Relations Act</i>	12
1. Section 51	13
2. Section 54	13
D. Is There a Need for Two Separate Sections to Empower the Courts to Reapportion Entitlement to Property?	14
E. The Concept of Fairness Under the <i>Family Relations Act</i>	15
1. Factors Which Demonstrate Unfairness	16
2. Summary	17
F. Variation of Maintenance Provisions in Agreements	17
1. The Former Law	18
2. The Current Law	19
3. Links Between Maintenance and Property Division	20
G. Other Grounds for Varying a Spousal Agreement	20
1. Change of Circumstances	20
2. Duty of Disclosure	22
3. Agreement Does Not Refer to All Assets	22
H. Interpretation of Separation Agreements	23
I. Agreements Made Before 1979	24
J. Reconciliation	25
K. Summary	26

	PAGE
IV FAMILY ASSETS	28
A. Introduction	28
B. Problems of Characterization	29
1. Some Examples	29
2. Gifts	30
3. Investments	32
4. Inherited Property	32
5. Hobbies	33
6. Pensions	33
(a) Pensions Which Are Not Family Assets	33
(b) Valuation and Division of Pensions Which Have Not Vested	34
(i) Pension Entitlement Offset By Other Assets	34
(ii) The <i>Rutherford</i> Formula	35
(iii) Application and Variation of the <i>Rutherford</i> Formula	36
(c) Pensions Which Have Vested and Under Which Income Is Being Received Prior to Separation	37
(d) General Comment on Pensions	38
C. Once a Family Asset Always a Family Asset?	39
D. Summary	40
V BUSINESS ASSETS AND VENTURES	43
A. Introduction	43
B. Business Assets v. Family Assets	44
C. Contributions	45
1. Direct Contribution	45
2. Indirect Contribution	46
(a) Generally	46
(b) Effective Management of Household or Childbearing Responsibilities	46
(c) Inherited Property	47
(d) Separate Property	48
(e) Negative Contributions	49
(f) Inadequate Contributions	49
(g) Onus of Proof	50
(h) Other Kinds of Indirect Contribution	50
(i) Theory	51
D. Intangible Assets	53
1. Property and Personal Rights	53
2. Career Assets	53
3. Professional Practices	54
4. Valuation	55
5. The Non-Owning Spouse's Interest	56
6. Reapportionment of Other Family Assets	56
7. Maintenance	57
E. Summary	57
VI SECTION 51	59
A. Introduction	59
B. Factors Relevant to an Inquiry Under Section 51	60
1. Help From Parents of One Spouse in the Form of Sale of Property on Favourable Terms	60

	Page
2. Conduct of the Parties During the Marriage	60
3. Rise in the Value of Assets After Separation Due to Inflation	61
4. Contributions by One Spouse to Maintaining Assets After Separation	61
5. A Lengthy Separation Prior to Application for Relief	61
6. The Business Acumen of One of the Spouses	61
7. The Fact that Maintenance has not Been Paid	62
8. The Existence of the Business Asset Prior to the Marriage, Notwithstanding a Lengthy Marriage	62
9. Summary	62
C. Factors Listed in Section 51	63
1. Length of Marriage — Subsection 51(a)	63
2. Length of Separation — Subsection 51(b)	66
(a) As a Corollary to s. 51(a)	66
(b) As It Relates to Valuation	66
(c) Use and Occupation	67
(d) Inflation	68
3. Date When Property was Acquired or Disposed of — Subsection 51(c)	69
4. The Extent to Which Property was Acquired Through Inheritance or Gift — Subsection 51(d)	70
5. The Need of Each Spouse to Become or Remain Economically Independent and Self-Sufficient — Subsection 51(e)	70
(a) Maintenance v. Entitlement to Family Property	70
(b) Lump Sum v. Periodic Maintenance	71
(c) Lengthy Marriages	72
(d) Practice	72
(e) Need to Keep Assets Intact	72
6. "Any Other Circumstances . . ." — Subsection 51(f)	73
(a) Separate Estates	73
(b) Unequal Contributions	73
(c) Other Factors	74
D. Summary	75
1. Section 51	75
2. Criteria For Determining Entitlement v. Criteria For Determining Divisible Property	76
VII SECTION 52	77
A. Introduction	77
B. Section 52(1)	77
C. Variation of an Order Under Section 52	77
D. Section 52(2)	78
E. Assets With Little or No Present Value	79
F. Orders for Partition and Sale	79
G. Section 52(3)	81
H. Compensation for Assets Conveyed Away	81
1. Generally	81
2. "Disposed of"	82
3. Relevance of Conduct	82
4. Temporal Aspects	82
5. Valuation	83

	PAGE
VIII VALUATION	84
A. Introduction	84
B. Practice Under the <i>Family Relations Act</i>	84
1. Placing a Value on Entitlement	84
2. Dividing Proprietary Interests	84
3. Examples From Cases Under the <i>Family Relations Act</i>	85
C. Approaches to Valuation	86
1. Date of Separation	86
2. The Date of the Triggering Event	87
3. The Date of the Hearing	87
D. The Utility of a Discretion to Fix a Valuation Date	87
E. Practical Considerations	88
F. Business Assets	88
G. Summary	89
IX THE NATURE OF ENTITLEMENT TO FAMILY PROPERTY	90
A. Introduction	90
B. Death of a Spouse	90
1. Generally	90
2. Other Jurisdictions	91
3. Theory	93
C. Debts and Bankruptcy	95
1. Generally	95
2. An Example	96
(a) The Mortgage	96
(b) The First Judgment	97
(c) The Second Judgment	97
(d) The Assignment in Bankruptcy	98
3. Fraudulent Conveyances	98
D. Obligations of the Owning Spouse	99
1. Responsibility For Losses	99
2. Management and Control	100
X CONDUCT	102
A. Introduction	102
B. Theory	103
1. Marital Fault	104
2. Contribution	104
3. Intention	104
4. Summary	105
XI THE PROPER OPERATION OF FAMILY PROPERTY LEGISLATION	107
A. Introduction	107
B. The Need for Family Property Legislation	107
C. Separate v. Shared Rights	109
D. The System For Shared Property Rights	109
1. Basis of Entitlement	109
2. When Rights Arise	111
(a) Generally	111
(b) Triggering Events	111
(c) The Nature of the Non-Owing Spouse's Interest	112
(d) Determining and Valuing Entitlement	113
(e) Summary	113

	PAGE
3. What Property Should be Divisible?	113
4. The Role of Discretion to Vary Entitlement to Property	115
E. Need for Legislative Amendment	115
1. Problems of Transition	116
(a) Spousal Agreements	116
(b) Section 51(f)	116
(c) Conduct	116
(d) Property Rights and Maintenance Obligations	117
(e) Business Assets	117
(f) A Brief List of Unresolved Issues	118
2. Conclusion	118
F. A Brief Comparison of British Columbia Legislation with That of Other Canadian Jurisdictions	119
G. Summary of Conclusions	120
XII SUMMARY	124
APPENDICES	127
A <i>Family Relations Act</i> R.S.B.C. 1979, c. 121	127
B "Division of Property" Chart	147
C Family Property Legislation in Canadian Jurisdictions	167



A. The Family Relations Act

Whenever people become involved in a financial enterprise, they are well advised to enter into an agreement stipulating their respective rights and interests during the life of the enterprise and on its conclusion. This is no less true where the financial enterprise is marriage rather than a commercial venture. Unfortunately, people who marry usually do not turn their minds to these questions until the possibility of marriage breakdown arises.

Under the law in force until 1972,¹ there was little legal intervention with the explicit or tacit arrangements of financial interests made by spouses. Unfairness was a consequence for several reasons. Title to property was often placed as a matter of course in the name of the spouse who was the income earner, undervaluing or ignoring the contributions of the spouse who was homemaker. During the course of the marriage, it did not usually matter who owned property. On marriage breakdown it was usually too late to correct matters.

The enactment of the current *Family Relations Act*² provided a dramatic solution to this problem. Under that Act, spouses are entitled to their separate property during the currency of their marriage. On marriage breakdown, the nature of property changes. It may be classified as either "family assets" or "business assets."³ Regardless of who originally "owned" the property, each spouse becomes entitled to a one-half interest in family assets. A spouse may also be entitled to an interest in "business assets" owned by the other spouse, if he or she contributed, directly or indirectly, to their acquisition.⁴

In many cases, equal entitlement to family property might be perceived as unfair. Consequently, courts were given the discretion to vary the statutory entitlement,⁵ and it was also open to spouses to specifically agree on what their rights and interests should be.⁶ Under the *Family Relations Act*, however, the courts have jurisdiction to vary the provisions of an agreement made by spouses if they are unfair.⁷

B. The Potential for Litigation

The introduction of the current *Family Relations Act* has coincided with a dramatic increase in family litigation. New legislation often invites litigation, particularly if it incorporates a judicial discretion. Other factors have undoubtedly contributed to the number of cases which proceed to trial. Increasing property values in 1979 and 1980 provided spouses with the subject matter of, and the means of financing, a dispute. Economic recession over the past several years has placed additional strain on relationships. The incidence of divorce or separation is high. These are all factors which promote litigation.

In the usual course of events, litigation generated by new legislation diminishes as principles become settled. That has not happened with litigation

¹ In 1972, the *Family Relations Act*, S.B.C. 1972, c. 20, was enacted. Sections 8 and 9 of that Act gave the courts jurisdiction to vary property rights. Most of the litigation under that Act concerned entitlement to the matrimonial home: see further K.B. Ferquhar, "Section 8 Of The Family Relations Act — An Experiment In The Exercise Of Judicial Discretion And The Distribution Of Matrimonial Property," (1979) 13 U.B.C. L. Rev. 169. That Act was replaced by the *Family Relations Act*, R.S.B.C. 1979, c. 121.

² *Ibid.*

³ Sections 45-6.

⁴ *Ibid.*

⁵ Section 51.

⁶ Sections 43, 48.

⁷ Section 51.

over family property. Over the past several years, lawyers and members of the public have expressed concern over the operation of the property provisions of the *Family Relations Act*.

C. Recent Developments

The potential of the *Family Relations Act* for costly litigation has led to two recent developments that could resolve many of the law's current problems. First, an informal Family Law Division of the British Columbia superior courts has been established on an experimental basis. By specializing, judges in the Family Law Division might be able to make the law governing family matters more consistent and certain.

Second, there is increasing movement away from litigation as a means of resolving family disputes. Many perceive that spouses would be better served if their disputes were settled through mediation rather than litigation. Steps have been taken so that lawyers, and others expert in family law matters, can become accredited mediators.⁸ This method of dispute resolution is likely to be swifter, less expensive and less emotionally disruptive to the spouses than the judicial process.

Currently, some spouses resolve their disputes through arbitration, but this method is not significantly different from litigation. In an arbitration, the parties are usually represented by lawyers. Instead of a judge, however, the parties agree on an arbitrator to adjudicate. Arbitration may be faster than litigation, but it is frequently just as expensive. Mediation differs from arbitration. A mediator meets with the spouses to discuss their differences, and assists them in arriving at a fair resolution of their dispute through negotiation and conciliation.

It remains to be seen whether these two developments will cure the present failings of family law. They represent serious attempts, however, to make family law more predictable and the consequences of marital breakdown less traumatic.

D. Scope of the Study Paper

A review of the current law discloses that few principles governing the division of matrimonial property can be safely regarded as settled. Research on almost any discrete issue will disclose numerous conflicting decisions. Lawyers are unable to advise their clients with certainty. Many issues present open questions that, failing agreement of the parties, can only be answered by a judgment after trial.

The full nature of the problems which face spouses, lawyers and courts in applying family law cannot be grasped without familiarity with the current law governing the division of matrimonial property. This Study Paper is both a review of the current law and a critical examination of the provisions of the *Family Relations Act*. In many cases, it is not a statement of the current law, but rather a summary of conflicting authority on particular issues. That is the nature of the problem itself.

⁸ See Attorney General Statutes Amendment Act (No. 2), 1985, Bill 55, s. 1.

CHAPTER II

SEPARATE PROPERTY, THE CONSTRUCTIVE TRUST AND FAMILY PROPERTY LEGISLATION

A. Introduction

Before 1979, a spouse was entitled to his or her separate property, both during marriage and after marriage breakdown. On marriage breakdown, the disposition of property was determined generally by its legal ownership.¹

Separate property was not an entirely appropriate concept to apply to property owned by spouses. In many marriages, property is acquired through the efforts of both spouses. Legal title to property did not always reflect the means by which that property was acquired. In 1968, a case arose which dramatically demonstrated the unfairness of the concept of separate property.

B. *Murdoch v. Murdoch*²

The Murdochs married in 1943. The marriage broke down in 1968. Over the course of the marriage, the spouses first worked together on a number of ranches. Later, the husband acquired ranches of his own. The wife contributed physical labour to these various ranching operations. Her chores included haying, raking, swathing, and mowing; driving trucks and tractors; dehorning, vaccinating and branding cattle; and the usual duties of a homemaker. The wife never contributed money to these operations. Title to all of the property was held in the husband's name.

At trial and on appeal it was held that the wife had no interest in the property. The Supreme Court of Canada's decision was handed down in 1973. It was held that at common law, the wife's contributions to the marriage, not being in the form of property or money, did not justify conferring an interest in property. The majority of commentators on the *Murdoch* case were critical of its conclusions. The next several years witnessed a revolution as both courts and legislatures attempted to fashion rules which would regulate the division of matrimonial property in a more equitable manner.

C. The Constructive Trust

1. INTRODUCTION

The common law took a narrow view concerning disputes over property. Rights to property were determined by reference to legal ownership and to agreements made by its owner and another. This approach was often unsatisfactory.

The courts of equity regarded rights to property differently. One or more persons might have legal ownership of property. Others might have beneficial interests in the property. If so, the legal owners were regarded as trustees of the property to the extent of those beneficial interests. Courts of equity were prepared to enforce the legal owner's obligations to the beneficial owner by imposing a trust on him.

When dealing with property owned by spouses, a trust might arise in one of three ways. First, the legal owner of property might expressly declare that the property is held in trust for the other spouse. Second, the spouses may

¹ There were two exceptions to this rule. A spouse was entitled to share in property owned by another spouse where it could be established that the property was held subject to an actual or resulting trust. To establish that property was held subject to an actual trust, at a minimum the non-owning spouse had to prove that that was the spouses' common intention. To establish that property was held subject to a resulting trust, the non-owning spouse had to prove that he or she had directly contributed to the property.

² (1973) 41 D.L.R. (3d) 367 (S.C.C.).

have had the common intention that the legal owner held the property in trust for the non-owning spouse. Third, the non-owning spouse may have contributed money or property directly to the acquisition of property owned by the other spouse. The owning spouse would be a trustee to the extent of the value of the contribution.

In the absence of intention to create a trust, or actual contribution, the courts were unprepared to provide a remedy by the recognition of a trust as a vehicle to assert a proprietary right. Where a person conferred benefits on another, but these contributions were not directly related to the acquisition of property, no interest in that property arose.

Equity was, however, prepared to impose a trust, known as a "constructive trust," in certain circumstances to remedy an injustice. A constructive trust might be imposed, for example, to facilitate the recovery of benefits gained as a result of undue influence,³ criminal conduct,⁴ fraud,⁵ and breaches of trust or fiduciary duty.⁶ Up until ten years ago, the application of the constructive trust was narrowly confined. Over the past decade, however, the exigencies of matrimonial property litigation made more urgent the need for courts to impose a trust as a remedial device in cases not falling within the traditional areas in which constructive trusts had been applied. This perception coincided with increased interest by courts and academics in the principles of unjust enrichment and the law of restitution. The process by which Canadian courts came to recognize that, in appropriate circumstances, a constructive trust might be used to recover benefits obtained through inequitable conduct, or to remedy unjust enrichment, is a fascinating one which is useful to explore in brief.

2. DEVELOPMENT OF THE CONSTRUCTIVE TRUST IN ENGLAND

English courts adopted a narrow and traditional view in which the constructive trust was narrowly defined, and English authority on these issues was highly influential on Canadian courts. *Pettit v. Pettit*⁷, and *Gissing v. Gissing*⁸ each concerned an application by one spouse for an interest in the matrimonial home owned by the other spouse. In neither case had the non-owning spouse contributed directly to the acquisition of the property. In *Pettit*⁹ it was said:

As regards contributions, the traditional view is that, in the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property; but as regards improvements made by a person who is not the legal owner, after the property has been acquired, that person will not, in the absence of agreement, acquire any interest in the property or have any claim against the owner.

In *Gissing v. Gissing* the House of Lords held that:¹⁰

Any claimant to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant. . .

To establish the existence of such a trust, the claimant must produce evidence pointing to an intention to create the trust.

³ *Lancashire Loans v. Black*, [1934] 1 K.B. 380; *Goddard v. Carlisle*, (1821) 9 Price 169.

⁴ *Schobell v. Barber*, (1967) 60 D.L.R. (2d) 519; *Rasmussen v. Jurewitsch*, [1968] 2 N.S.W.R. 166; *Re Giles*, [1972] Ch. 544.

⁵ *Bannister v. Bannister*, [1948] W.N. 261.

⁶ *Pettit v. Pettit*, [1970] A.C. 777 (H.L.); *Gissing v. Gissing*, [1971] A.C. 886 (H.L.); *Cowcher v. Cowcher*, [1972] 1 W.L.R.

⁷ *Ibid.*

⁸ *Supra*, n. 6.

⁹ *Supra*, n. 6, at 794.

¹⁰ *Supra*, n. 6, at 887.

This traditional view was rejected by the English Court of Appeal the following year. In *Heseltine v. Heseltine*¹¹ it was held that:¹²

If the conduct of the husband is such that it would be inequitable for him to claim the property beneficially as his own, then, although it is transferred into his name, the court will impose upon him a trust to hold it for them both jointly, or for her alone, as the circumstances of the case may require.

This case was highly controversial. Nevertheless, inroads in the traditional approach had been made, and a substantial body of case law quickly developed, so that, notwithstanding that the applicant had not directly contributed to the purchase of property, a constructive trust was granted to a common law spouse,¹³ a mother-in-law,¹⁴ and third parties.¹⁵ Gradually the principle broadened so that a constructive trust might be imposed in order to grant relief from inequitable conduct, first in the context of matrimonial property, and then in other transactions.¹⁶ In *Hussey v. Palmer*¹⁷ it was said:¹⁸

[The constructive trust]. . . is a trust imposed by law whenever justice and good conscience require it. It is a liberal process founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property of it or a share in it.

3. THE POSITION IN CANADA

Canadian courts were as cautious as English courts in adopting the constructive trust as a mechanism for relief when one in equity and good conscience should hold property for the benefit of another. In *Murdoch v. Murdoch*,¹⁹ Laskin, C.J., dissenting, expressly approved the American position, quoting extensively from *Scott on Trusts*:²⁰

. . . [A] constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . [O]rdinarily a constructive trust arises without regard to the intention of the person who transferred the property. . . [It] is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.

Not until the decision of the Supreme Court of Canada in *Rathwell v. Rathwell*²¹ was the use of the constructive trust as a remedy to prevent unjust enrichment accepted in Canada. That case represented a significant departure from the traditional view of resulting and constructive trusts articulated in *Murdoch*.

4. RATHWELL V. RATHWELL

A husband and wife upon marriage pooled their resources, amounting to about \$700 each, in a joint account from which a down payment was made towards the purchase of property. The balance of the purchase price was paid by crop share. Over the years other land was purchased and in every case title was held in the husband's name. The Supreme Court of Canada held that

¹¹ [1971] 1 W.L.R. 342 (C.A.).

¹² *Ibid.*, at 346.

¹³ *Cooke v. Head*, [1972] 1 W.L.R. 518 (C.A.); *Eves v. Eves*, [1975] 3 All E.R. 768 (C.A.).

¹⁴ *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (C.A.).

¹⁵ *Binion v. Evans*, [1972] Ch. 359 (C.A.).

¹⁶ See, e.g., *D.H.N. Food Distributors v. London Borough of Tower Hamlets*, [1976] 1 W.L.R. 852.

¹⁷ [1972] 1 W.L.R. 1286 (C.A.).

¹⁸ *Ibid.*, at 1290.

¹⁹ [1975] 1 S.C.R. 423.

²⁰ (3rd ed., 1967) vol. 5, p. 3215 and 3413.

²¹ [1978] 1 E.T.R. 307 (S.C.R.).

the wife was entitled to a one-half interest in the property, on the basis of a resulting and a constructive trust. The majority judgment given by Dickson J., as he then was, and concurred in by Laskin C.J. and Spence J., clarified many of the uncertainties in the application of a constructive trust. Dickson J. considered whether the foundation of the constructive trust was "justice and equity"²² or the "intention" of the parties.²³ The requirement for intention would mean that there was no real distinction between an implied, resulting or constructive trust.²⁴ He concluded that "matrimonial property ought not to be governed by the strict considerations commonly applicable between strangers"²⁵ and that,²⁶

On the legal front, acceptance of the notion of restitution and unjust enrichment in Canadian jurisprudence has opened the way to recognition of the constructive trust as an available and useful remedial tool in resolving matrimonial property disputes. Lacking that, a court is reduced to searching for actual, inferred or, possibly, imputed agreement (common intent) when the plain fact is that there rarely is agreement because the parties do not turn their minds to the eventuality of separation and divorce.

Dickson J. was prepared to acknowledge the remedial aspect of the constructive trust partly because it possessed safeguarding features which limited the court's discretion to apply it. A constructive trust would not be imposed contrary to the actual or express intent of the parties; nor would it necessarily apply to property owned by one spouse before marriage. The beneficial interest would be proportional to the original contribution, direct or indirect. If there was no contribution there could be no share. Moreover, the constructive trust ought not to be used to create a form of community property by equitable distribution. Considering the cases, it was said:²⁷

Some of these situations may be analyzed as agreement or common intention situations. Such intention is generally presumed from a financial contribution. The doctrine of resulting trust applies. In others a common intention is clearly lacking and cannot be presumed. The doctrine of the resulting trust then cannot apply. It is here that we must turn to the doctrine of constructive trust.

Having stated the need for the constructive trust, Dickson J. defined the remedy in the following terms:²⁸

The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment. Thus, if the parties have agreed that the one holding legal title is to take beneficially, an action in restitution cannot succeed. . . [T]he manner in which title is registered may or may not be of significance in determining beneficial ownership. . . The state of title may be entirely fortuitous; it should not be taken as decisive against the non-titled party.

Dickson J. concluded that Mrs. Rathwell could recover either on a resulting trust, because of her initial contribution, or on a constructive trust imposed to remedy an unjust enrichment. Ritchie J. and Pigeon J. limited their reasons to the ground of resulting trust and declined to consider the issues of constructive

²² *Rimmer v. Rimmer*, [1953] 1 Q.B. 63, [1952] 2 All E.R. 863 (C.A.).

²³ *Pettit v. Pettit*, *supra*, n. 6; *Gissing v. Gissing*, *supra*, n. 6; *Murdoch v. Murdoch*, *supra*, n. 2.

²⁴ The cases on resulting trust turned on actual intent: *Re Vandervell's Trusts (No. 2)*, [1971] Ch. 269 (C.A.); constructive trusts on implied intent: *Dyer v. Dyer*, (1788) 2 Cox Eq. Cas. 92, 30 E.R. 42; *Barton v. Mair*, (1874) 44 L.J.P.C. 19; *The Venture*, [1908] P. 218 (C.A.).

²⁵ (1978) 1 E.T.R. 307, 318; cf. *Thompson v. Thompson*, [1961] S.C.R. 3, 26 D.L.R. (2d) 1.

²⁶ *Ibid.*, at 319.

²⁷ (1978) 1 E.T.R. 307, 326.

²⁸ *Ibid.*, at 328.

trust or unjust enrichment. Mr. Justice Martland (Judson, Beetz and DeGrandpre concurring) also decided the case by imposing a resulting trust. In their view the *Murdoch* case stood in the way of applying a constructive trust in disputes concerning matrimonial property. On a strict head count it would appear that the majority were against the remedial use of the constructive trust. A majority of the Supreme Court of Canada, however, subsequently endorsed the remedial use of the constructive trust in 1981 in the case of *Pettkus v. Becker*.²⁹

5. SUMMARY

During the last decade the courts fashioned the constructive trust into a powerful tool to remedy unjust enrichment. Most of the cases in which a constructive trust was applied involved disputes over matrimonial property in which one spouse sought an interest in property held in the other spouse's name, on the basis that the non-owning spouse's indirect contributions to the marriage had benefited the owning spouse.

The law's concern over the division of property upon marriage dissolution also found voice in legislation, which has to a large extent removed the driving need for the development of common law and equitable remedies for unjust enrichment in a marital context. These legislative developments are discussed in the next section.

D. Matrimonial Property Legislation in Canadian Common Law Jurisdictions

1. OVERVIEW

While the courts engaged in judicial reform, culminating in *Pettkus v. Becker*, provincial legislatures were equally concerned with revising the law governing matrimonial property. During the 1970's, every Canadian common law jurisdiction enacted legislation governing family property.³⁰ This legislation echoed developments occurring throughout the Commonwealth. For the most part, this legislation is similar. Each province or territory provides that spouses are entitled to their separate property during marriage. On marriage breakdown, spouses are entitled to share in family property. There is, however, some variation on important aspects of family property law.

2. SPOUSAL AGREEMENTS

All common law Canadian jurisdictions permit spouses to resolve their disputes over property by agreement.³¹ Generally, a spousal agreement relating to property is binding, unless void or voidable at common law. In British Columbia, the courts may review a spousal agreement and reapportion an unfair division of property. In Saskatchewan, property dealt with in an "interspousal agreement" is exempt from distribution as matrimonial property, unless at the time the agreement was made it was unconscionable or

²⁹ (1981) 19 R.F.L. (2d) 165 (S.C.C.).

³⁰ Until 1970, Quebec had a system of full community of property. This was altered in 1970 to a regime of "partnership of acquests" in which, generally, only property acquired during the marriage was divisible on marriage breakdown. The features of Quebec law on family property are similar to, and perhaps influenced, those adopted in Canadian common law jurisdictions.

³¹ *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 37; *The Marital Property Act*, S.M. 1978, C. 24/M 45, s. 5; *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 7; *The Matrimonial Property Act*, S. Nfld. 1979, c. 32, s. 16; *Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 4; *Family Law Reform Act*, R.S.O. 1980, c. 152; *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1, s. 4; *The Matrimonial Property Act*, S.S. 1979, c. M-6.1, s. 24; *Matrimonial Property Ordinance*, R.O.N.W.T., c. M-7, s. 28(2); *Matrimonial Property and Family Support Ordinance*, O.Y.T. 1979 (2nd), c. 11, s.s. 3, 5.

grossly unfair.³² Most provinces provide that a spousal agreement must be in writing, signed by the spouses and witnessed.³³

In Alberta,³⁴ and Saskatchewan³⁵ a spousal agreement must be made observing certain formalities beyond those required in other Canadian jurisdictions. Each spouse must acknowledge before different lawyers:

- (a) that he is aware of the nature and the affect of the agreement;
- (b) that he is aware of the possible future claim to property he may have under provincial legislation and that he intends to give up these claims to the extent necessary to give effect to the agreement; and
- (c) that he is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse.

In New Brunswick, the courts may disregard the provisions of a domestic contract where they are inequitable in the circumstances of the case, and the spouses challenging the agreement did not receive independent legal advice when it was made.³⁶

3. FAMILY PROPERTY

Three different approaches have been adopted to determine what property is susceptible to division on marriage breakdown.

In British Columbia, a non-owning spouse is entitled to share assets used for a family purpose and business assets if he or she has contributed to their acquisition or operation. That approach has also been adopted in Newfoundland,³⁷ Ontario,³⁸ Prince Edward Island,³⁹ and the Yukon Territory.⁴⁰

In Nova Scotia⁴¹ and the Northwest Territories⁴² all assets owned by the spouses are susceptible to division.

In Alberta,⁴³ Manitoba,⁴⁴ and Saskatchewan⁴⁵ legislation provides that spouses share all property except for defined categories of separate property. Separate property includes property owned prior to marriage, gifts and inheritances. Spouses are entitled to share in property acquired during the marriage, as well as in the increased value of separate property. In New Brunswick,⁴⁶ the courts have discretion to exclude assets owned before marriage or acquired by gift where it would be unfair or unreasonable to divide them having regard to listed considerations.

4. RECENT DEVELOPMENTS

The advantage separate property has over systems of shared rights in family property is simplicity. Legislation providing spouses with shared rights in family property must address conceptually difficult issues. The

³² *Ibid.*, s. 24. In the Yukon, *supra*, n. 31, s. 3(4) the courts may decline to enforce an agreement obtained through undue influence. This provision appears to confirm the position at common law.

³³ See, e.g., *Marital Property Act*, S.N.B. 1986, c. M-1.1, s. 37; *Matrimonial Property Act*, S. Nfld. 1979, c. 32, s. 35; *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 54.

³⁴ S. 38.

³⁵ S. 38.

³⁶ *Supra*, n. 31, s. 41.

³⁷ *Matrimonial Property Act*, S. Nfld. 1979, c. 32.

³⁸ *Family Law Reform Act*, R.S.O. 1980, c. 152.

³⁹ *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1.

⁴⁰ *Matrimonial Property and Family Support Ordinance*, O.Y.T. 1979 (2nd) c. 11.

⁴¹ *Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 13. Nova Scotia distinguishes between business assets and family assets but the court has jurisdiction to divide any asset.

⁴² *Matrimonial Property Ordinance*, R.Q.N.W.T. 1974, C. M-7.

⁴³ *Matrimonial Property Act*, R.S.A. 1980, c. M-9.

⁴⁴ *Marital Property Act*, S.M. 1978, c. 24/M 45.

⁴⁵ *The Matrimonial Property Act*, s.s. 1979, c. M-6.1; Prince Edward Island, *supra*, n. 31, s. 5 (4) provides that the value of ante-nuptial property, determined at the time of marriage, is deducted from the current net value of the property.

⁴⁶ *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 6.

varied and sometimes unique circumstances which must be taken into account when deciding on an appropriate division of property complicate both the task of the legislature in drafting appropriate legislation and of the courts in applying it.

Several years of experience have revealed unexpected problems in conferring shared rights in property on spouses, and a number of jurisdictions are considering revising their family property legislation. For example, the Australian Law Reform Commission has recently published a Discussion Paper on *Matrimonial Property Law*,⁴⁷ the Saskatchewan Law Reform Commission published a Report on *Tentative Proposals For Reform of the Matrimonial Property Act*,⁴⁸ the Alberta Institute of Law Research and Reform published a *Report on Matrimonial Law: Division of Pension Benefits Upon Marriage Breakdown*,⁴⁹ and a bill substantially amending the Ontario *Family Law Reform Act* was introduced in the Legislative Assembly.⁵⁰

5. SUMMARY

Determining the division of family property on marriage breakdown by reference to legal ownership was often unfair when property had been acquired through the mutual efforts of spouses. As a result, the courts modified the constructive trust in order to provide a non-owning spouse a share in family property when he or she had made contributions that benefited the family or the owning spouse. While the general principles underlying the remedial constructive trust are settled, many points of detail in its operation remain uncertain. The need for the remedial constructive trust in resolving disputes concerning matrimonial property was diminished by the enactment of legislation acknowledging that spouses shared rights in matrimonial property.

In many respects, Canadian legislation governing the division of family property resembles a statutory constructive trust. This legislation tended to endorse the legal principles formulated by the courts and, moreover, clarified a number of issues which were unsettled at common law. Experience with this legislation has disclosed a number of problems, both in philosophy and application. Canadian and other Commonwealth jurisdictions are currently involved in a review of matrimonial property legislation.

⁴⁷ Discussion Paper November 22, June 1985.

⁴⁸ September 1984.

⁴⁹ Report For Discussion No. 2, (May, 1985).

⁵⁰ Bill 1, June 4, 1984.

A. Agreements Under the *Family Relations Act***1. AGREEMENTS GENERALLY**

The *Family Relations Act* contemplates that spouses will arrange their respective rights to property in four different ways. They may enter into a contract before or during marriage. This is called a "marriage agreement."¹ On, or in anticipation of, marriage breakdown, they may enter into a contract which, again, spells out their specific rights. This is called a "separation agreement." Property interests may also be governed by an "ante or post nuptial settlement." (What is meant by an ante or post nuptial settlement is in many respects uncertain.) Lastly, they may have no agreement at all.

Under the *Family Relations Act*, a "marriage agreement" relates to spousal entitlement to family assets. It must be in writing, signed by both parties, and witnessed by one or more other persons.² Separation agreements and ante or post nuptial agreements are referred to in the Act, but not defined.

Whether or not the spouses have attempted to define their rights by contract, the court has jurisdiction to determine entitlement to maintenance and to family property in a manner inconsistent with the agreement. The source of the court's jurisdiction to do so depends on the category of spousal agreement into which the agreement in issue falls.

2. SEPARATION AGREEMENTS

Upon separation, and also in the course of negotiations prior to a divorce, many spouses enter into agreements in which they set out in detail how they have settled some or all of the issues between them. These agreements are often prepared by solicitors and are frequently complex. They generally deal with such issues as maintenance for spouse and children, division of property, custody and access rights, division of debts, education for the children, costs, and even continuing use by one spouse of property owned jointly by both spouses. Most of these agreements contain clauses which provide that the parties release each other from any liabilities other than those contained in the agreement, and relinquish any rights either spouse may have to the assets or income of the other spouse. Another common provision acknowledges that both parties have satisfied themselves that they are fully familiar with the estate of the other spouse and that they have executed the agreement voluntarily and without coercion. Such agreements are generally called "separation agreements."

Under the *Family Relations Act* separation agreements have three important consequences. They evidence marriage breakdown. They trigger entitlement to family assets. The statutory entitlement to family assets is also subject to the terms of a separation agreement. The *Family Relations Act* does not define what is meant by a separation agreement.

3. WHAT IS A SEPARATION AGREEMENT?

It cannot be stated with any assurance what must be covered in an agreement or what formalities must attend its execution so that it qualifies as a separation agreement within the meaning of the Act. In *Haaf v. Haaf*,³ for

¹ The Act provides that certain formalities must be observed before a marriage agreement is binding. This approach leaves in some doubt the status of agreements made before or during marriage which do not comply with the required formalities.

² Subsections 48(2) and (3).

³ (1981) 27 B.C.L.R. 392.

example, it was held that a separation agreement need not be in writing. In *Rutherford v. Rutherford*,⁴ however, Seaton J.A. said that:

[T]his Act, when it refers to a separation agreement, contemplates something more than an oral agreement to live apart.

He continued:⁵

It would be unlikely that a casual agreement — 'Shall we separate?' 'Yes—let's.' — would belong in that company. It follows that to be a separation agreement the arrangement must be a formal one. I do not go so far as to say that it must be in writing.

Craig J.A. disagreed. He said:⁶

I think the phrase [separation agreements] comprehends any situation in which the parties have agreed to live apart notwithstanding the fact that they have not settled all the terms upon which they will live apart.

Problems can be anticipated if an unwritten agreement disposing of family assets were to be a triggering event pursuant to section 43(1). This position might well encourage litigation in respect of property not dealt with specifically by the parties. It would also create complex evidentiary problems about what the parties actually agreed to. Substantial uncertainty would be a likely result.⁷

Some separation agreements fall within the meaning of "marriage agreements" as defined in section 48(2), since they would constitute:⁸

[A]n agreement entered into by a man and a woman . . . during their marriage . . . to take effect on the . . . execution of the agreement, . . . for . . . ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage. . . .

On the other hand, the term "separation agreement" may more naturally be seen as a post nuptial settlement, subject to section 54 of the Act.⁹

B. Jurisdiction to Vary Spousal Entitlement to Property

Two sections of the *Family Relations Act* provide the courts with jurisdiction to vary interests in property. Section 51 applies in the absence of an agreement, or where the parties have entered into a marriage agreement. Section 54 applies to "an ante nuptial or post nuptial settlement that is not a marriage agreement."¹⁰ On the face of the Act, there is a gap. What jurisdiction has a court to vary an agreement which is neither a "marriage agreement" nor "an ante nuptial or post nuptial settlement that is not a marriage agreement?" As it turns out, the terms of section 54 have been interpreted so that virtually any agreement relating to property which is not a marriage agreement will be characterized as an ante nuptial or post nuptial settlement.

Section 54 is based upon section 5 of the English *Divorce and Matrimonial Causes Act*¹¹, which provided as follows:

⁴ (1981) 30 B.C.L.R. 145, 153, 23 R.F.L. (2d) 337 (C.A.).

⁵ *Ibid.*

⁶ *Ibid.* 161; see also *Paulovich v. Paulovich*, [1984] B.C.D. Civ. 1676-05 (S.C.).

⁷ Section 43 of the Act provides that a separation agreement is a triggering event. Section 43(3)(b) provides that the division of family property is subject to the provisions of a separation agreement or a marriage agreement. Under section 51, only a marriage agreement is subject to reappportionment. An informal separation agreement would thus bind the parties, serve as a triggering event, but not be subject to reappportionment under section 51. Section 54 would then be the only tool available to the courts in order to reappportion property. Section 54 refers to ante and post nuptial settlements not to separation agreements. The courts, however, have used section 54 routinely to vary separation agreements. The case law which deals with formal separation agreements is voluminous while the case law which deals with "informal" separation agreements is all but non-existent.

⁸ *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 48(2).

⁹ Section 9 of the 1972 *Family Relations Act* is the predecessor of section 54 of the current Act. There is little doubt that under the former Act, separation agreements were classified as "post nuptial" agreements.

¹⁰ Subsection 54(1).

¹¹ 22 & 23 Vict., 1859, c. 61.

**As to marriage settlements of parties
after final decree of nullity of marriage**

5. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

This section was enacted two years after the English *Divorce and Matrimonial Causes Act* of 1857. It was designed to meet a specific problem. Frequently, on marriage, property would be settled on one or both spouses, or on a trustee for the benefit of one or both spouses. For example, an ante nuptial settlement might be used to settle property in trust for the spouses by their parents. As a condition of the marriage, the husband might settle property in trust for the wife. The terms of a settlement were often inappropriate in the circumstances following marriage breakdown. Without specific authority, courts could not vary the terms of a settlement.

The word "settlement," at law, is a term of art, narrowly defined to mean a formal arrangement of specific interests in real or personal property generally held in trust. A narrow definition of "settlement" in section 5, however, did not answer the problems that arose in many arrangements made between spouses or by a third party on behalf of the spouses. The courts, consequently, gave the word "settlements" in section 5 a wide interpretation.¹² The word, in this context, was not precisely defined, beyond the requirement that it referred to an arrangement made between or to one or both spouses *because of their status as spouses*.¹³ The section was not intended to vary agreements between spouses made in anticipation of the dissolution of their marriage. It was intended to vary arrangements made by parties who expected the marriage to endure, which were rendered inappropriate by marriage dissolution.

Whether the practice of the courts in using section 5 of the English Act (or section 54 of the British Columbia *Family Relations Act*) to vary the terms of separation agreements is legitimate is certainly open to question. Nevertheless, shortly after the enactment of section 5, it was construed to apply to a separation agreement.¹⁴

The manner in which section 54 and its predecessors have been interpreted confers on the courts a broad jurisdiction to vary the division of property settled in spousal agreements. There was, accordingly, no specific need to provide a coordinate jurisdiction that provisions of a marriage agreement could be varied under section 51 of the *Family Relations Act*.

It should be observed that before enactment of the current *Family Relations Act*, very few applications were made to vary the terms of separation agreements relating to division of property. The courts were reluctant to interfere with contracts freely entered into. Enacting a general rule that spouses on marriage breakdown are entitled to equal shares in family property changed all that. That rule appears to have altered fundamentally the attitude of courts to all spousal agreements.

C. Sections 51 and 54 of the Family Relations Act

When a court is asked to review a spousal agreement relating to property, one might guess that it would be fairly straightforward to determine whether

¹² *Bosworthick v. Bosworthick*, [1927] P. 64 (C.A.); see also *Link v. Link*, [1983] B.C.D. Civ. 1673-01 (S.C.).

¹³ *Melvill v. Melvill and Woodward*, [1930] P. 159 (C.A.).

¹⁴ *Stone v. Stone and Brownrigg*, (1864) 3 Sw. & Tr. 372, 373; 164 E.R. 1319.

courts were to rely on jurisdiction under section 51 or section 54. If the agreement qualifies as a "marriage agreement," the court's jurisdiction is found in section 51. Any other agreement relating to property falls under section 54.

In practice, the resolution of this issue has proved to be fairly straightforward, although some courts have adopted irreconcilable approaches. To understand the nature of the problem, some appreciation of the distinctions between sections 51 and 54 is called for. The following discussion contrasts these two sections.

1. SECTION 51

Section 51 of the *Family Relations Act* provides as follows:

Judicial reapportionment on basis of fairness

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self sufficient; or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Under this section, the court may consider and vary entitlement to any property owned by either or both spouses.¹⁵ The courts are empowered to reapportion entitlement to property if the provisions in question are "unfair" having regard to specific criteria listed in the section. Category (f) ("any other circumstances . . .") appears to be quite broad. In the first several years following enactment of the *Family Relations Act*, the courts tended to take a restrictive view of the variables that it could consider on an application for variation under section 51.¹⁶ More recently, courts have relied upon subsection 51(f) to take into account a wide number of factors when determining whether to reapportion entitlement to family property.¹⁷

2. SECTION 54

Section 54 of the *Family Relations Act* provides as follows:

Variation of marriage settlements

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting

¹⁵ Jurisdiction to divide property not covered by s. 43 or a marriage agreement (which are non-family assets) is narrowly confined. Non-family assets may not be divided, for example, only because there are no family assets to divide. Non-family assets may be divided where practical considerations dictate that particular family assets should not be divided: *O'Riordan v. O'Riordan*, (1985) 46 R.F.L. (2d) 180 (B.C.S.C.).

¹⁶ *Schlatter v. Schlatter*, (1982) 41 B.C.L.R. 278 (C.A.); *Baird v. Baird*, (1981) 33 B.C.L.R. 77, 25 R.F.L. (2d) 17 (C.A.); *Girard v. Girard*, (1983) 42 B.C.L.R. 305 (C.A.); cf. *Akerib v. Akerib*, (1983) 44 B.C.L.R. 75 (S.C.).

¹⁷ See, e.g., *Douglas v. Douglas*, (1984) 43 R.F.L. (2d) 262 (B.C.S.C.); *Stewart v. Stewart*, (1984) 56 B.C.L.R. 375 (C.A.); *Murphy v. Murphy*, (1984) 44 R.F.L. (2d) 60 (B.C.S.C.).

either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

Under this section, the court may only look to "the settled property." It may not consider or vary entitlement to family assets not mentioned in the agreement in question. In this respect, section 54 confers a much narrower jurisdiction on the courts than does section 51. In other respects, however, the jurisdiction conferred by section 54 is broader than that provided by section 51.

Section 54(2) provides, for example, that the court may order that all or part of the settled property be used for the benefit of a child of a spouse. No comparable power is offered by section 51.¹⁸ Moreover, the court's discretion under section 54 is unconfined. It may make any order that is appropriate in the circumstances.¹⁹ Under section 51, the court's consideration is confined to listed items.²⁰

D. Is There a Need for Two Separate Sections to Empower the Courts to Reapportion Entitlement to Property?

The relationship between sections 51 and 54 has led to some confusion. In large measure this confusion results from a belief that agreements identical in substance should not be subject to different standards depending on the category of agreements into which they fall. Some courts have tried to interpret the Act so that separation agreements, however they are made, are reviewed according to a single standard.

Case authority on this issue, however, appears to be fairly clear. Separation agreements which comply with all the formal and substantive requirements of a section 48 marriage agreement are reviewable under section 51.²¹ Separation agreements which do not qualify as marriage agreements are reviewable under section 54.²²

The courts have experienced some difficulties in characterizing the nature of the agreement to determine the source of their jurisdiction to reapportion property interests. In *Britney v. Britney*,²³ for example, it was held that an agreement which complied with the formalities required for a marriage agreement was not a marriage agreement since it was concerned mostly with custody and maintenance. Section 48 defines a marriage agreement as an agreement that relates to the management or ownership of family assets. In *Kramer v. Kramer*,²⁴ it was held that section 54 cannot apply to separation agreements since section 54 refers to post or ante nuptial settle-

¹⁸ It should be observed that the court may order property be held in trust for the benefit of children of the marriage under s. 52: see *infra*, chapter VII, SECTION 52.

¹⁹ *Divinsky v. Divinsky*, (1970) 2 R.F.L. 372 (S.C.); *Maricic v. Maricic*, (1981) 27 B.C.L.R. 157 (S.C.); *Goodman v. Goodman*, (1981) 23 B.C.L.R. 175, 19 R.F.L. (2d) 415 (S.C.).

²⁰ *Thomas v. Thomas*, (1981) 29 B.C.L.R. 348, 23 R.F.L. (2d) 244 (S.C.); *Schlatter*, *supra*, n. 16; *Baird*, *supra*, n. 16; *Girard*, *supra*, n. 16.

²¹ *Swanson v. Swanson*, (1983) 34 R.F.L. (2d) 155 (B.C.S.C.); *Sutton v. Sutton*, (1981) 29 B.C.L.R. 37 (S.C.); *Gwynn v. Forsythe*, (1982) 40 B.C.L.R. 358, 31 R.F.L. (2d) 188 (S.C.); *var'd* (1985) 45 R.F.L. (2d) 86 (B.C.C.A.); *Minckler v. Minckler*, (1982) 41 B.C.L.R. 356 (S.C.).

²² *Goodman*, *supra*, n. 19; *Mirus v. Mirus*, (1980) 19 B.C.L.R. 193, 15 R.F.L. (2d) 152 (S.C.); *Veoh v. Veoh*, (1981) B.C.D. Civ. 1680-03 (S.C.), *aff'd* (1982) 31 R.F.L. (2d) 442 (B.C.C.A.); *Acorn v. Acorn*, (1980) 15 R.F.L. (2d) 257 (B.C.S.C.); *Cruze v. Cruze*, (1983) B.C.D. Civ. 1680-02 (S.C.) (agreement executed prior to the Act); *Maricic*, *supra*, n. 19.

²³ [1982] B.C.D. Civ. 1680-06 (S.C.).

²⁴ (1984) 49 B.C.L.R. 184, 36 R.F.L. (2d) 297 (S.C.).

ments. A separation agreement has nothing to do with marriage, but concerns itself with separation and divorce.

In some cases, the courts seem to have overlooked the importance of classifying the nature of the agreement in question. They have applied section 54 without any apparent consideration of whether the section was applicable.²⁵

It has also been held that it is irrelevant which section applies to the agreement in question, since the court enjoys the same jurisdiction under either to vary the agreement if it is unfair.²⁶ As we have seen, the jurisdictions differ in several important respects.

The cases suggest that the existence of two sections dealing with essentially the same matter is needlessly confusing. Certainly, arguments may be raised to justify treating formal agreements differently from informal agreements, and there is probably merit in distinguishing between agreements made before marriage breakdown, and those made after. It is difficult to see, however, why the court should exercise essentially the same jurisdiction whatever agreement is before it, but the source of that jurisdiction varies depending on which formalities were observed when the agreement was made.

E. The Concept of Fairness Under the Family Relations Act

Section 51 of the *Family Relations Act* provides that the courts may reapportion a division of property under a marriage agreement if its terms are unfair. What is meant by "unfair" is open to question. Some courts interpret "unfair" to mean improvident from the perspective of one party to the agreement.²⁷ Other courts apply a more restrictive approach, that the contract be unconscionable at common law before it will be "unfair" within the meaning of Section 51.²⁸ The Act provides little guidance on the meaning of "unfair."

Courts which require proof of unconscionability are reluctant to interfere with the settled affairs of the spouses. The agreement might be unfair in the sense that the court would have divided the property differently in the absence of the agreement. Nevertheless, courts have refused to vary an agreement if its terms were clearly understood,²⁹ it was intended by both parties to conclude their statutory and legal rights,³⁰ or it was relied upon by the parties in conducting their own affairs³¹ or settling other aspects of the dispute between the spouses.³²

In *Vanstone v. Vanstone*,³³ for example, it was held that where the spouses understood the terms of an agreement and consented to those terms at

²⁵ *Supra*, n. 22.

²⁶ *Allan v. Allan*, [1982] B.C.D. Civ. 1698-01 (S.C.).

²⁷ See, e.g., *Minkler*, *supra*, n. 21; *Swanson*, *supra*, n. 20; *Ford v. Ford*, (1983) 37 R.F.L. (2d) 132 (B.C.S.C.). See also *Gwynn*, *supra*, n. 21, at 90, where Hutchison J.A. commented:

One starts with the premise underlying the statute: apart from any agreement about division of property each party is entitled to a one-half interest in family assets. That is the standard against which any alleged unfairness in the agreement is to be measured.

²⁸ *MacKay v. MacKay*, [1981] B.C.D. Civ. 1631-04 (S.C.); *Good v. Good*, [1981] B.C.D. Civ. 1631-03 (S.C.); the court also held that the parties cannot exclude the courts. See also *Green v. Green*, (1982) 36 B.C.L.R. 48 (S.C.); *Dodds v. Dodds*, [1980] B.C.D. Civ. 1680-08 (S.C.); *Kosar v. Kosar*, [1982] 28 R.F.L. (2d) 135 (S.C.), where a provision that the husband will buy out the wife over six years without interest was held to be not sufficiently unfair to overturn the contract.

²⁹ *Acorn*, *supra*, n. 22; *Vanstone v. Vanstone*, (1983) 33 R.F.L. (2d) 426 (B.C.S.C.).

³⁰ *Ibid.* See also *Hill v. Hill*, (1981) 23 R.F.L. (2d) 431 (B.C.S.C.).

³¹ *Townsend v. Townsend*, (1983) 37 R.F.L. (2d) 46 (B.C.S.C.).

³² *Little v. Little*, (1982) 29 R.F.L. (2d) 370 (B.C.S.C.).

³³ *Supra*, n. 29.

trial, the court will not set that agreement aside.³⁴ It was said that a compromise cannot be set aside unless counsel acted under a misapprehension.

In *Townsend v. Townsend*,³⁵ the parties signed a separation agreement in 1980 after 18 years of marriage. The agreement did not mention pension rights. The wife applied for an interest in her husband's pension. It was held that the wife was not entitled to any claim to the pension because the husband had relied on the separation agreement in taking early retirement. *Little v. Little*,³⁶ also involved an application by a wife for a share in her husband's pension. The husband testified that if the original agreement had given his wife an interest in his pension, then a different agreement respecting maintenance would have been made. These cases appear to refuse variation of agreements on the ground of an estoppel.

In *Stevens v. Stevens*,³⁷ the British Columbia Court of Appeal held that a separation agreement overrides any other rights a spouse may have to family assets. General words in an agreement that the parties will each keep his or her own assets are sufficient to exclude a subsequent claim to family assets. This case may significantly alter the approach courts take to varying agreements respecting family property. It may also be restricted to its facts, since it involved a separation agreement made before the current *Family Relations Act* was implemented.

These differences in approach, which in turn lead to differences in result, follow from the imprecision of the use of the word "unfair" in Section 51 of the *Family Relations Act*.

Actually, it is surprising that there is any doubt concerning the meaning of "unfair" and the circumstances in which the jurisdiction under s. 51 should be exercised. There is little question that family property legislation in British Columbia and other Canadian common law jurisdictions is patterned after the remedial constructive trust. The remedial constructive trust is a remedy for "unfairness" but that concept is defined by the principles of unjust enrichment. It did not confer a jurisdiction on the court to do what was fair. It provided a remedy where one spouse, to his or her detriment, conferred a benefit on the other spouse, and it would be inequitable to allow the benefit to remain where it was. As with other aspects of family law, there is confusion between the operation of the *Family Relations Act* and the former law. Some courts use the *Family Relations Act* as if it codified the former law, and results are little different than if the courts had only the actual, implied, resulting or constructive trust at their disposal to divide family property. Other courts look upon the *Family Relations Act* as conferring a broader jurisdiction than the former law, and still other courts regard the *Family Relations Act* as conferring a narrower jurisdiction.

1. FACTORS WHICH DEMONSTRATE UNFAIRNESS

The different approaches courts have adopted to their jurisdiction to vary agreements relating to property are often reflected in the factors found to be relevant in determining whether an agreement is unfair.

Courts which assume a broad jurisdiction to vary entitlement to property will often intervene when an agreement does not correspond with the division

³⁴ In *Vanstone*, *supra*, n. 29, the wife applied to set the contract aside on the ground that she did not agree to it. This application, consequently, differs from an application to set a contract aside or to vary it on the ground that it is unfair. The court stated that it could not intervene.

³⁵ *Supra*, n. 31.

³⁶ *Supra*, n. 32.

³⁷ (1982) 41 B.C.L.R. 51, 31 R.F.L. (2d) 90 (B.C.C.A.).

they would have ordered.³⁸ When such an approach is taken, the fact of unequal division may, in itself, be regarded as evidence of unfairness.³⁹

Courts which interpret "unfair" to mean "unconscionable," require more than an unequal division of property. They look for signs of inequality of bargaining power.⁴⁰ The concept of "inequality of bargaining power," however, has been interpreted more broadly in spousal disputes than it has been in commercial contexts. In *Worobieff v. Worobieff*,⁴¹ for example, the court looked to the emotional state of the parties. It was held that guilt or another motive for accepting less than half the assets must be considered in determining whether the agreement is fair.

Courts which interpret "unfair" to mean "unconscionable" favour finality. They are usually unmoved by the fact of a bad bargain.⁴² An agreement is fair if understood by the parties to it and freely entered into.⁴³

2. SUMMARY

The foregoing discussion reveals inconsistencies in the law governing variation of spousal agreements relating to family property. These inconsistencies stem from the nature of the provisions of the *Family Relations Act*.

The purpose behind the *Family Relations Act* may be understood in either of two ways. It may represent a decision that family property, as a general rule, is to be shared equally, whether spouses have turned their minds to that issue or not.⁴⁴ That result is the consequence of a broad jurisdiction to vary spousal agreements.

Alternatively, and more likely, the *Family Relations Act* was intended to provide for the division of property where the spouses cannot agree on how that is to be done. The jurisdiction to supervise spousal agreements should then be narrow, confined to ensuring one spouse has not taken advantage of another spouse. An agreement which divides property unequally is not for that reason unfair. There must be something more which renders the agreement unfair and calls for court intervention.

F. Variation of Maintenance Provisions In Agreements

So far our discussion has focussed on issues arising out of the division of family property on marriage breakdown. Support obligations present separate, but related, problems. A spouse who receives a significant share of property may no longer require maintenance, or may require less than if he or she had received no share of property. Consequently, there is a link between entitlement to family property and entitlement to maintenance.

Under Section 61 of the *Family Relations Act*, the court enjoys an unfettered discretion to determine what constitutes adequate maintenance, and to order its payment. Under section 11 of the *Divorce Act*, the court has a

³⁸ See, e.g., *Swanson*, *supra*, n. 21.

³⁹ *Jones v. Jones*, [1982] B.C.D. Civ. 1680-04 (S.C.); with respect to maintenance, see *Willis v. Willis*, (1983) 34 R.F.L. (2d) 212 (B.C.S.C.). See also *Mirus*, *supra*, n. 22; *McCallum v. McCallum*, [1982] B.C.D. 1698-03 (S.C.); *Britney*, *supra*, n. 23; *Collbow v. Collbow*, [1982] B.C.D. Civ. 1680-02 (S.C.), where the division was unequal, but both spouses sought legal advice, negotiations took six months and the wife refused to take the advice of her solicitor; *Gwynn*, *supra*, n. 21.

⁴⁰ See, e.g., *Jones*, *ibid*.

⁴¹ (1980) 19 B.C.L.R. 241, 109 D.L.R. (3d) 179 (S.C.).

⁴² *Clark v. Clark*, [1983] B.C.D. Civ. 1697-01 (S.C.).

⁴³ *Ibid.*; *Little*, *supra*, n. 32; *Sorens v. Sorens*, (1932) 41 B.C.L.R. 51, 31 R.F.L. (2d) 90 (C.A.); *Hill*, *supra*, n. 30 (a pension plan case); *MacKay*, *supra*, n. 28, where the contract was not set aside because it was "realistic"; *Dodds*, *supra*, n. 28; see also *McCallum*, *supra*, n. 39.

⁴⁴ *Supra*, n. 27.

similar jurisdiction over maintenance awarded as part of the decree *nisi* of divorce.⁴⁵

The jurisdiction to review maintenance agreements is of interest in several respects. This jurisdiction is often invoked when the fairness of a division of family property is reviewed. Although the principles which govern these separate jurisdictions differ, there has inevitably been some interaction. The result is that the former law governing variation of maintenance obligations has been altered.

1. THE FORMER LAW

Prior to the enactment of the current *Family Relations Act*, the law governing variation of separation agreements was somewhat complex, but its broad outlines were clear enough. Anyone who contemplated making an application for maintenance which differed from that provided by a separation agreement had to first consider the general judicial attitude toward varying maintenance obligations.

The courts routinely cautioned that while they had the jurisdiction to vary maintenance obligations, the circumstances under which they would actually do so were quite circumscribed. Applications to set aside or vary any aspect of a maintenance agreement were seldom successful. That attitude was forcefully stated in *Dal Santo v. Dal Santo*:⁴⁶

It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed. Lawyers must be able to advise their clients in respect of their future rights and obligations with some degree of certainty. Clients must be able to rely on these agreements and know with some degree of assurance that once a separation agreement is executed their affairs have been settled on a permanent basis. The courts must encourage parties to settle their differences without recourse to litigation. The modern approach in family law is to mediate and conciliate so as to enable the parties to make a fresh start in life on a secure basis. If separation agreements can be varied at will, it will become much more difficult to persuade the parties to enter into such agreements.

Although the policy of the law was straightforward, its application was not. The courts, for example, treated provisions in separation agreements with respect to maintenance, custody and access of children as in no way restraining them from doing what they saw fit in their capacity as *parents patriae*.⁴⁷

Most applications to overturn separation agreements concerned the provisions for maintenance for the wife.⁴⁸ The courts both before and after the Act have treated the provisions of separation agreements respecting property differently from those concerning maintenance for the spouse. This pre-Act distinction was bluntly stated in a post-Act case. In *Hill v. Hill*,⁴⁹ Darling L.J.S.C. declined to vary the property provisions in an agreement executed prior to the Act under which the wife received no portion of the husband's pension. He did, however, vary the maintenance provisions respecting both the wife and the child. He said:⁵⁰

In this area I think the settled law of the country takes a different approach . . . It is this: that provisions in a separation agreement are not sufficient to oust

⁴⁵ See, however, *Griffioen v. Griffioen*, (unreported Ontario Dist. Ct.) noted at September 27, 1985, Ontario Lawyers Weekly, p. 12, where it was held that, except in divorce proceedings, the court has no right to rescind the provisions of a maintenance agreement; cf. *Green v. Green*, (1982) 36 B.C.L.R. 48 (B.C.S.C.).

⁴⁶ (1975) 21 R.F.L. 117, at 120 (B.C.S.C.); see also *Woods v. Woods*, (1975) 22 R.F.L. 370, at 379 (Ont. S.C.); *Taylor v. Taylor*, (1978) 8 R.F.L. (2d) 70 (Ont. C.A.); *Dal Santo* has most recently been endorsed by the British Columbia Court of Appeal in *Polech v. Polech*, (1985) 61 B.C.L.R. 217, 45 R.F.L. (2d) 1 (C.A.).

⁴⁷ *Mahlin v. Mahlin*, (1978) 2 R.F.L. (2d) 104 (Ont. U.F.C.); *Krueger v. Toubnor*, (1974) 17 R.F.L. 86 (Man. Q.B.).
⁴⁸ *Salvety v. Salvety*, (1971) 6 R.F.L. 75, at 80 (Ont. S.C.); *Wong v. Wong*, (1972) 8 R.F.L. 345 (B.C.S.C.); *Shorwood v. Shorwood*, (1980) 18 R.F.L. (2d) 200 (Ont. U.F.C.); *Morrow v. Morrow*, (1974) 44 D.L.R. (3d) 711 (N.S.S.C., App. Div.).

⁴⁹ *Supra*, n. 30.

⁵⁰ *Ibid.*, at 437.

the jurisdiction of the court to do what it thinks proper under the circumstances with respect to maintenance both for a wife or child.

This does not mean that wherever a wife sought to vary the maintenance obligations provided by agreement, she stood a good chance of success. In general, it seems fair to say that cases such as *Hunt v. Hunt*,⁵¹ where Mr. Justice Ruttan declined to vary an agreement under which the wife received no maintenance, notwithstanding a fairly dramatic change of circumstances, appear to have been the rule rather than the exception.

2. THE CURRENT LAW

It had become clear, even before the *Family Relations Act*, that the courts have a continuing jurisdiction to vary the order *nisi* of divorce in respect of maintenance for children or spouse.⁵² This jurisdiction exists even where a wife waives her rights to maintenance in a separation agreement.⁵³ Any doubt on this aspect of the court's jurisdiction was put to rest in *Goldstein v. Goldstein*,⁵⁴ where it was held that, insofar as maintenance provisions in a separation agreement are concerned, the parties could not oust the jurisdiction of the court "to regulate, as a matrimonial matter, the affairs of the husband and wife and children."⁵⁵

This body of law has not been expressly altered by the Act.⁵⁶ In fact, it is taken for granted.⁵⁷

In *Ferguson v. Douglas*,⁵⁸ the provisions of a separation agreement governing maintenance were incorporated into the decree *nisi*. Later the wife applied to vary the maintenance provisions pursuant to section 11 of the *Divorce Act*. Proudfoot J. held that the wife was entitled to do this and referred the matter of *quantum* to the registrar. The husband objected that the wife, aside from being barred by the agreement, had lived pursuant to its terms for 13 years. Proudfoot J. held that these facts were matters for the registrar to consider.

In another case,⁵⁹ it was held that where the agreement provided for maintenance for life, and that agreement was incorporated into the *nisi*, then cases such as *Dal Santo* have no application. The jurisdiction of the court to vary a *nisi* pursuant to the *Divorce Act* is independent of its jurisdiction to vary agreements.⁶⁰

Other courts have adopted a much narrower approach to this issue. In *Good v. Good*,⁶¹ the court was faced with a separation agreement which provided for maintenance of the wife. At the divorce hearing, which had been undefended, counsel for the petitioner asked for and received an order dismissing the claim for maintenance. After the divorce, a problem arose. The agreement, which had been incorporated into the decree *nisi*, provided that all enforcement was to go through family court. Both counsel took the position that the family court's jurisdiction had ended upon the entry of the decree *nisi*. The wife sought to amend the maintenance order in the *nisi* to

⁵¹ (1974) 18 R.F.L. 376 (B.C.S.C.).

⁵² *Malcovitch v. Malcovitch*, (1978) 91 D.L.R. (3d) 594 (Ont. H.C.); *Caldeson v. Calderson*, (1970) 71 W.W.R. 470 (B.C.S.C.); Wong, *supra*, n. 48.

⁵³ See *Malcovitch*, *ibid.*, for a full discussion.

⁵⁴ (1976) 67 D.L.R. (3d) 624 (Alta. C.A.).

⁵⁵ *Ibid.*, at 630.

⁵⁶ *Possner v. Possner*, (1981) 29 B.C.L.R. 64, 123 D.L.R. (3d) 493 (S.C.); *Good*, *supra*, n. 27; *Loblowitz v. Loblowitz*, [1980] B.C.D. Civ. 1680-07 (S.C.); *Corry v. Corry*, [1983] B.C.D. Civ. 1622-03 (S.C.).

⁵⁷ *Hill*, *supra*, n. 30.

⁵⁸ [1983] B.C.D. Civ. 1635-04 (S.C.).

⁵⁹ *Morrow v. Morrow*, (1980) 18 R.F.L. (2d) 374 (B.C.S.C.).

⁶⁰ See also *McKenzie v. McKenzie*, (1980) B.C.D. Civ. 1635-04 (S.C.).

⁶¹ *Supra*, n. 28.

include the maintenance which had previously been agreed to, in order to launch enforcement proceedings. Spencer L.J.S.C. held that since the wife had by her agreement settled all her rights and claims to corollary relief under section 11, she should not be permitted to depart from it.⁶²

3. LINKS BETWEEN MAINTENANCE AND PROPERTY DIVISION

Although the courts do not have express power to do so, frequently when varying a spouse's entitlement to property they will also order a corresponding variation in support obligations. The courts, without apparent concern whether they have jurisdiction, have not only amended specific provisions in agreements, but deleted provisions, imposed new terms, and imposed new obligations on the parties. In this connection there appears to be no distinction between provisions respecting maintenance and those respecting property.

In *Maricic v. Maricic*,⁶³ Wetmore L.J.S.C. held that:

- (1) The court has a broad discretion to vary separation agreements, (in this instance, under section 54);
- (2) When exercising this discretion, the court can look at "items of set-off" arising outside the agreement; and
- (3) The court may vary entitlement to property and to maintenance.

In *Goodman v. Goodman*,⁶⁴ the agreement gave the wife the right to stay in the home until remarriage. Esson J. held that this provision was unfair. He varied the agreement to specify that the wife was entitled to remain in the home only until the youngest child reached the age of 19 and then, since her right to occupation of the home had been restricted, ordered the inclusion of a maintenance provision in the decree nisi so that the court could vary it later if circumstances changed. In *Gwynn v. Forsyth*,⁶⁵ the court varied the agreement made between the parties with respect to maintenance, the division of property and the rights of the wife in the event of the husband's death.

Some cases suggest that the court can vary an agreement which it finds unfair and, in order to "equalize" the distribution of assets, the court can order a spouse to transfer land and to make a lump sum payment of maintenance.⁶⁶ The British Columbia Court of Appeal, however, has held this to be improper.⁶⁷

G. Other Grounds for Varying a Spousal Agreement

The courts have identified three specific factors, the existence of any one of which will likely lead to variation of a spousal agreement.

1. CHANGE OF CIRCUMSTANCES

Jurisdiction to vary maintenance obligations is based primarily on the need of one spouse resulting from change of circumstances rendering the agreement obsolete.⁶⁸ While the jurisdiction to vary has survived the Act, the

⁶² *Dal Santo v. Dal Santo*, (1975) 21 R.F.L. 117 (B.C.S.C.) was relied on. If the wife cannot enforce the agreement in family court, it was held, then she could launch an action for breach of contract.

⁶³ *Supra*, n. 19.

⁶⁴ *Ibid.*

⁶⁵ *Supra*, n. 21.

⁶⁶ See, e.g., *Jones*, *supra*, n. 39.

⁶⁷ *Rutherford*, *supra*, n. 4.

⁶⁸ In *Schwartz v. Schwartz*, [1982] B.C.D. 1626-09 (S.C.), for example, the agreement provided that the maintenance provisions would remain in force notwithstanding the dissolution of the marriage or merger of the agreement in the nisi. The court held that it had the jurisdiction to alter the maintenance provisions, although it noted that the contract still served as an important indicator of what the parties had thought proper at the time they entered into the agreement. See also *Moul v. Moul*, [1983] B.C.D. Civ. 1635-06 (C.A.). The same result was achieved in *Green*, *supra*, n. 28, notwithstanding a clause in the agreement that the wife released and discharged the husband from any liability to pay maintenance. See also *Harding v. Harding*, [1981] B.C.D. Civ. 1635-04 (S.C.).

criteria for its exercise seem to have changed. Now, the word "fairness" appears to be cited as frequently as the word "need."⁶⁹

What kind of change of circumstances must be shown before the court will vary a spousal agreement? Prior to the Act, the courts in England and in Canada held that their jurisdiction to vary maintenance provisions in an agreement existed only if there was an *unexpected* change of circumstances.⁷⁰ The consensus was that if a contract was intended to be a final disposition of all obligations, then a foreseeable change of circumstances could not be a reason to disturb the contract.⁷¹

That logic has almost disappeared from the judgments of the British Columbia courts. Instead, the courts now say that they will alter the contract in *unusual* circumstances.⁷² As a result, courts have intervened in cases where the change of circumstances was entirely foreseeable. In *Posener v. Posener*⁷³ for example, the contract did not provide for a reduction in maintenance, but did provide for an increase. It was held that such an imbalance in the agreement was a proper ground for variation.

The jurisdiction to vary maintenance provisions in separation agreements on the ground of changed circumstances is probably based on necessity. Many people hold that spouses, especially wives, should not be left destitute even if they, by agreement, accepted that risk. This reason for a continuing jurisdiction to review maintenance arrangements does not necessarily justify a similar jurisdiction to vary provisions in agreements dealing with property division. As with authority concerning reapportionment of property, there is a division in cases involving variation of maintenance provisions between courts which are prepared to act on the basis of unfairness and those which are concerned with intervening with settled affairs.⁷⁴

The courts view their jurisdiction to vary property arrangements more conservatively. In *Heslop v. Heslop*,⁷⁵ for example, it was held that change of circumstances should not be a ground for varying obligations since if it were, there would be no good reason to go to the trouble and expense of making a separation agreement. This reasoning has much to recommend it, whether the agreement governs property rights or maintenance obligations.

In most cases, "fairness" is analyzed from the perspective of the date of the agreement,⁷⁶ an approach approved by the British Columbia Court of Appeal,⁷⁷ and applied many times.⁷⁸ Since property rights and maintenance obligations are to a large extent linked, it is difficult to see how the courts are to determine these issues using different principles respecting variation. Legislative guidance on the significance of change of circumstances is probably desirable.

⁶⁹ See, e.g., *Campbell v. Campbell*, [1983] B.C.D. Civ. 1635-07 (C.A.) which concerned an application to reduce the amount of maintenance being paid. The wife's financial position had improved dramatically. The court dismissed the application because the husband had not provided evidence of his circumstances, and the court could not determine who "received the better of the bargain." The traditional analysis still appears occasionally. In *Farquhar v. Farquhar*, [1983] 1 D.L.R. (4th) 244 (Ont. C.A.), the Ontario Court of Appeal refused to vary an agreement on the ground of changed circumstances. The court ruled that circumstances inevitably change. While changed circumstances is a relevant factor if the agreement is vulnerable on some other basis, it is not by itself a sufficient basis for avoiding an agreement.

⁷⁰ *Burns v. Burns*, (1963) 38 D.L.R. (2d) 572 (Ont. H.C.).

⁷¹ *Malcovich*, *supra*, n. 52.

⁷² *Posener*, *supra*, n. 56; but see *Heslop v. Heslop*, (1984) 39 R.F.L. (2d) 322 (B.C.S.C.).

⁷³ *Ibid.* See also *Harding*, *supra*, n. 68, for the same result.

⁷⁴ See, e.g., *Pelech*, *supra*, n. 46.

⁷⁵ *Supra*, n. 72; see also *Stokes v. Stokes*, (1985) 46 R.F.L. (2d) 207 (B.C.C.A.).

⁷⁶ See, e.g., *Mirus*, *supra*, n. 22, where it was open to the judge to vary an agreement by granting decree nisi and varying under section 11, but he declined to do so because the agreement was fair at the time it was made.

⁷⁷ *Ioannidis v. Ioannidis*, (1982) 39 B.C.L.R. 368, 30 R.F.L. (2d) 362 (C.A.).

⁷⁸ See, e.g., *Willis*, *supra*, n. 39, where a contract was varied by erasing maintenance payments and arrears because the agreement was unfair in that the husband was obligated to pay maintenance to the wife for life after a very short marriage; see also *Rowley v. Rowley*, [1981] B.C.D. Civ. 1631-10 (S.C.); *Clark*, *supra*, n. 42; *Crase*, *supra*, n. 22; *Gwynn*, *supra*, n. 21.

2. DUTY OF DISCLOSURE

By 1981, the courts were holding that a spouse owes a duty of "utmost good faith" to the other spouse. Accordingly, if a spouse fails to disclose all facts pertaining to his assets, the agreement may be avoided. A general release clause cannot bar an application to set aside an agreement on the ground of non-disclosure.⁷⁹

In *Swanson v. Swanson*,⁸⁰ it was held that the duty to act with utmost good faith applies not only to the existence of assets but also to their value. Moreover, where there has been a breach of that duty, the court is empowered to make any order it thinks fair. In *Ford v. Ford*,⁸¹ the court thought it fair to alter the maintenance portion of an agreement because the wife had been ignorant of the husband's financial affairs at the time she signed the agreement.

Even where there is no question of fraud, and both parties are mistaken as to the extent of the assets in question the agreement will be set aside if the existence or value of assets is not disclosed.⁸² In Ontario, on the other hand, if a spouse does nothing to hide assets from the other spouse, then the mere fact of non-disclosure is not a ground for setting the agreement aside.⁸³

When preparing a separation agreement, counsel usually attempt to list all property held by both parties. But this is not always done, and in such cases the parties rely on general releases and clauses acknowledging access to all records. These contractual provisions, however, are of limited utility. If a court finds that the non-owning spouse was in fact unaware of the existence or value of an asset it may set the agreement aside.

3. AGREEMENT DOES NOT REFER TO ALL ASSETS

Problems may arise even where the parties are fully aware of each other's assets and their value. Frequently agreements refer only to those assets which are the subject of specific agreement. Rights in other assets are dealt with by general provisions. For example, an agreement may provide that all assets not mentioned in the agreement are to be retained by the party who has possession of them. Alternatively, the absence of any reference may reflect a tacit abandonment of any claim.

Some courts have recently begun to hold that failure to deal with an asset in an agreement renders that asset liable to redistribution pursuant to the Act. Courts have gone so far as to reapportion entitlement to assets which, at the time the agreement was executed, could not have been the subject of a claim by the non-owning spouse. For example, in *Wilson v. Wilson*,⁸⁴ the parties executed a separation agreement prior to the Act which did not refer to the husband's medical practice. The wife was awarded 50% of that asset. In *Swanson v. Swanson*,⁸⁵ the court varied a separation agreement which, it held, should have dealt with the husband's pension plan. In *Rowley v. Rowley*,⁸⁶ the pension rights of the husband existed at the time of the agreement but no

⁷⁹ *Lamers v. Lamers*, (1978) 6 R.F.L. (2d) 283 (B.C.S.C.); *Mirus*, *supra*, n. 21; *Kilburn v. Kilburn*, (1980) 16 R.F.L. (2d) 306 (B.C.S.C.); *Cousens v. Cousens*, (1980) 18 R.F.L. (2d) 333 (Ont. D.C.).

⁸⁰ *Supra*, n. 21.

⁸¹ *Supra*, n. 27.

⁸² *Mirus*, *supra*, n. 22.

⁸³ *Farguehar*, *supra*, n. 69.

⁸⁴ (1983) 37 R.F.L. (2d) 205 (B.C.C.A.); a distinction should be drawn between an agreement silent on the disposition of a particular asset and one which, in error, does not record the disposition agreed to by the spouses. In the latter case, it is open to the courts to rectify the agreement: *see, e.g., Stirling v. Stirling*, [1985] B.C.D. Civ. 1698-01, 1652-01 (S.C.); *Eaton v. Eaton*, (1981) 21 R.F.L. (2d) 322 (Ont. H.C.).

⁸⁵ *Supra*, n. 21.

⁸⁶ *Supra*, n. 78.

reference was made to those rights. The court decided that the agreement did not bind the spouses because it was "inconclusive."

Other cases are diametrically opposed. Instead of holding that failure to mention assets constitutes a ground to vary the agreement, the courts have held that such silence is a reason *not* to vary the agreement. For example, in *Little v. Little*,⁸⁷ the husband successfully argued that the agreement was silent on the subject of his pension because he agreed to other points on the strength of his pension income. In *Hill v. Hill*,⁸⁸ a separation agreement executed in 1975 did not include any reference to the husband's pension plan. The court upheld this agreement in 1981 because it contemplated a conclusion to all statutory and legal rights of the parties to the property of the other.⁸⁹

To be safe, lawyers who draft separation agreements are well advised to refer to every asset owned by a client whether or not that asset is the subject of distribution, both in order to prove disclosure if that should become necessary, and to prove that every asset was the subject of scrutiny and negotiation by both sides. This is an approach which must certainly admit to practical difficulties, but it would appear no other course safely avoids court intervention.

H. Interpretation of Separation Agreements

Sometimes the courts are called upon to interpret separation agreements just as they are called upon to interpret any other kind of agreement. In general, the courts have preferred to adopt a fairly strict approach.

For example, where a contract provided that the husband would pay for the son's religious education, it was held that those words mean that the husband was not liable to pay for the secular portion of the child's education in a religious school.⁹⁰ Where an agreement which provided that maintenance is to cease if the wife cohabited "with a male person as though they were man and wife, for a period of not less than 45 days," it was held that the quoted phrase did not contemplate an informal liaison, but an integrated relationship having most, but not necessarily all, of the following elements: financial interdependence, sexual relationship, a common principal residence, obligations to share the responsibilities of running a home, shared use of assets, shared responsibilities for raising children, and an expectation that such interdependence will continue.⁹¹

Courts have stated that, when interpreting a separation agreement, both the words of the agreement and the result of a particular interpretation on other aspects of the relationship between the parties must be considered. For example, where the agreement was very generous to the wife in respect of maintenance, and where the court varied the agreement in some respects, the court also resolved its own doubts as to whether the contract was intended to survive death (the contract was "binding on their respective heirs, administrators and executors") and varied the agreement to make it clear that all payments except arrears would cease on death.⁹²

Even in this area, the courts have come to strikingly differing conclusions. Two examples:

⁸⁷ *Supra*, n. 32.

⁸⁸ *Supra*, n. 30.

⁸⁹ The court varied the agreement with respect to maintenance.

⁹⁰ *Goldman v. Goldman*, [1981] B.C.D. Civ. 1631-06 (S.C.).

⁹¹ *Bellis v. Innes*, (1980) 21 R.F.L. (2d) 40 (B.C. Co. Ct.). See also *Have v. Have*, [1981] B.C.D. Civ. 1631-02 (S.C.). For similar judgments see *Schwartz v. Schwartz*, [1980] B.C.D. Civ. 1631-02 (S.C.) and *Easton v. Easton*, (1980) 16 R.F.L. (2d) 253 (B.C.S.C.).

⁹² *Gwynn v. Forsythe*, *supra*, n. 21.

In one case it was held that where an agreement says that the wife may stay in the home until she no longer "requires" it as a matrimonial home, the word "requires" means "needs," and since the children are grown and the wife has sufficient assets, she no longer "requires" the home and must leave.⁹³ In another case where the agreement provided that the wife may remain in the home "so long as she shall require the same," it was held that these words mean that the wife has a right to stay in the home as long as she wants to because the husband expected her to stay until a change in circumstances occurred.⁹⁴ In a third twist, the parties signed a contract in 1977 which provided that the wife would remain in the home until she remarried. The court simply varied the agreement pursuant to section 54.⁹⁵

The courts have refused to permit evidence respecting the common intention of both parties to interpret a separation agreement.⁹⁶ On the other hand, it has been held that the court must go behind the language of the agreement and examine the surrounding circumstances in order to decide what meaning should be given to the words.⁹⁷

The point here is not to determine which of various evidentiary rules should apply to interpreting separation agreements, but rather to demonstrate further the consequences of the uncertain jurisdiction to vary an agreement under the Act. If courts have jurisdiction to vary an agreement on the basis of fairness, then the courts need not resort to legal niceties such as rules of evidence which only beg the issue of the appropriateness of any variation. On the other hand, if the courts are not to have the power to vary on the ground of "fairness," then the Act should spell out specifically when a variation is permitted so that inconsistent decisions do not result from statutory ambiguity or the inconsistent application of evidentiary rules.

I. Agreements Made Before 1979

It is tempting to suggest that the courts are much more hesitant to intervene in the case of a pre-Act agreement than in the case of a post-Act agreement.

The most important case in this area is *Stevens v. Stevens*.⁹⁸ There, an agreement was executed in 1977 and the wife sought to vary the agreement on the ground that since the Act did not exist at the time she signed the agreement, the triggering event must be the date of the dissolution of the marriage in 1981. Accordingly, the wife claimed that she was entitled to three assets which, under the new Act, were conceded to be family assets. The Court of Appeal agreed that the triggering event was the dissolution of the marriage and not the agreement which pre-existed the Act, but then went on to hold that section 43(3) of the Act, and the agreement itself, "override" her interest in those assets. Moreover, the court held that the general words in the agreement to the effect that the parties shall each retain his or her monies, savings, etc. are sufficient to exclude the claim by the wife without further specific words of release.

This decision suggests that, as a matter of jurisdiction, not discretion, an agreement freely entered into prior to the Act will not be reviewed by the court

⁹³ *Winrob v. Winrob*, (1982) 35 B.C.L.R. 268, 26 R.F.L. (2d) 436 (C.A.).

⁹⁴ *Cruise v. Cruise*, *supra*, n. 22. See also *Vanstone*, *supra*, n. 29.

⁹⁵ *Goodman*, *supra*, n. 19.

⁹⁶ *Keetley v. Keetley*, [1981] B.C.D. Civ. 1631-09 (S.C.). Is "income" limited to "salary from employment?" See also *Bailey v. Bailey*, [1980] B.C.D. Civ. 1680-10 (S.C.), where parol evidence was not allowed for the purpose of modifying an agreement.

⁹⁷ *Winrob*, *supra*, n. 93.

⁹⁸ *Supra*, n. 43.

if the wife has waived her rights to any such relief. If this is correct, then the position in British Columbia is the same as that in New Brunswick.⁹⁹

The *Stevens* reasoning has been adopted in other cases. In *Hill v. Hill*,¹⁰⁰ for example, a contract executed in 1975 did not include any reference to the husband's pension plan. The court upheld this agreement in 1981 because it found the agreement contemplated the extinguishment of all statutory and legal rights of the parties to each other's property. The court held further that an agreement on maintenance obligations cannot oust the jurisdiction of the court to make an order for spousal maintenance.¹⁰¹

No case specifically states that agreements reached before the Act came into force are to be treated differently from post-Act agreements. However, in many cases in which agreements have been restrictively interpreted, the agreement was executed prior to the Act.

A Saskatchewan case comes very close to a direct statement of judicial policy. In *Poole v. Poole*,¹⁰² the court held that it must interpret agreements with reference to the law applicable when the agreement was made. Even so, there is British Columbia authority to the contrary. In *Wilson v. Wilson*,¹⁰³ the *Family Relations Act* was found to apply to a pre-Act agreement entered into by the spouses. The agreement did not refer to a doctor's practice. In 1982, that asset was held to be a family asset and the wife was awarded 50% of its value. Yet at the time the agreement was made, under the former *Family Relations Act*, the wife had no interest in the practice.¹⁰⁴

In *Harding v. Harding*,¹⁰⁵ Gould J. relied on section 54 to vary both the terms of a pre-Act agreement and arrears of maintenance owing under it. The British Columbia Court of Appeal has also held that a pre-Act separation agreement is a post-nuptial agreement as defined by section 9 of the old Act, and as such can be varied under section 54.¹⁰⁶

It is open to question whether it is desirable to permit parties to re-open issues settled before new rights were conferred by legislation. Perhaps many of the cases in which an application for variation of an agreement was dismissed turn on the court's unspoken antipathy to the idea of overturning an agreement which was patently fair at the time that it was made, considering the laws then prevailing.

J. Reconciliation

At common law, a reconciliation terminated a separation agreement unless the parties intended all or part of it to survive,¹⁰⁷ and this rule probably still applies.¹⁰⁸ Under the *Family Relations Act*, the making of a separation agreement triggers entitlement to family assets. What effect does reconciliation have on that entitlement? This issue has been considered in only a handful of cases.

⁹⁹ In *Godbout v. Godbout*, (1983) 32 R.F.L. (2d) 309, at 315 (N.B.Q.B.), the court held that, notwithstanding a possible reconciliation, since the agreement referred to after-acquired property, the wife "would therefore have no right to claim thereto".

¹⁰⁰ *Supra*, n. 30.

¹⁰¹ See also *Ferguson v. Douglas*, [1983] B.C.D. Civ. 1635-04 (S.C.).

¹⁰² (1981) 23 R.F.L. (2d) 439 (Sask. U.F.C.).

¹⁰³ *Supra*, n. 84.

¹⁰⁴ The courts have adopted a similar approach with respect to provisions in pre-Act agreements respecting pension plans. *Clark*, *supra*, n. 42; *Minckler*, *supra*, n. 21.

¹⁰⁵ *Supra*, n. 68.

¹⁰⁶ *Mitchell v. Mitchell*, (1981) 33 B.C.L.R. 106, 26 R.F.L. (2d) 97 (C.A.); see also *Possener*, *supra*, n. 56.

¹⁰⁷ *Bailey v. Bailey*, (1982) 26 R.F.L. (2d) 209 (Ont. C.A.).

¹⁰⁸ *Briney*, *supra*, n. 23. See also *Godbout*, *supra*, n. 99; *Barry v. Barry*, (1985) 44 R.F.L. (2d) 334 (B.C.C.A.).

The issue will arise in two circumstances: where the spouses subsequently separate again and where one spouse dies after reconciliation.

Should the spouses separate again, it becomes difficult to apply the principles of the *Family Relations Act* to determine an appropriate division of property. For example, in *Pacey v. Pacey*,¹⁰⁹ the spouses married in 1973 and entered into a separation agreement in 1976. Under the agreement, the husband released any rights he might have had in a condominium owned by his wife. The spouses reconciled in 1979, and purchased a new home. The husband contributed \$10,000 to the downpayment. The wife sold her condominium and contributed \$60,000 to the downpayment. In 1980, the spouses separated permanently. An unequal division of family assets in favour of the wife was ordered. It was held that, since the husband had released his rights in the condominium, he could have no interest in the \$60,000 raised from its sale.¹¹⁰

In *Donald v. Donald*,¹¹¹ the spouses were divorced, at which time property was divided between them. They later remarried. On marriage breakdown, it was held that the court could only consider the circumstances of the second marriage in determining an appropriate division of property.

Where one spouse dies after reconciliation, the issue of entitlement to property will arise where the deceased spouse's successors claim an interest. That occurred in *Kolbe v. Kolbe*.¹¹² The court accepted tenuous evidence of an intention to reconcile and found that the separation agreement had terminated. Presumably, the termination of the separation agreement also terminated entitlement to family assets under the *Family Relations Act*. The court held that those challenging the surviving spouse's right to share in the estate had to establish their claim on the balance of probabilities.

These cases suggest some of the problems posed by reconciliation. So far, the principles to be applied to resolve these problems are largely uncertain. Perhaps legislation might clarify whether statutory entitlement to family assets survives the termination of a separation agreement. A distinction might also be drawn between executory contracts and contracts under which title to property has passed. Where title has passed, it is probably undesirable to return spouses to the positions they occupied before the agreement was made. On a subsequent marriage breakdown, however, the courts should probably look to the whole of the marriage, and prior property arrangements, to determine an appropriate division of property. The problems posed by the death of a spouse after the occurrence of a triggering event are considered in Chapter IX of this Study Paper.

K. Summary

The *Family Relations Act* refers to marriage agreements, separation agreements and ante and post nuptial agreements. Only marriage agreements are defined in the Act. The Act treats these various agreements differently. Some confusion arises in distinguishing between these agreements.

Arguments can be raised to support a distinction between agreements which satisfy minimum formal requirements of execution and those which do not. Similarly, there is probably some justification for distinguishing between

¹⁰⁹ [1981] B.C.D. Civ. 1654-17.

¹¹⁰ See also *Berman v. Berman*, (1980) 12 R.F.L. (2d) 165.

¹¹¹ [1981] 28 B.C.L.R. 240 (S.C.).

¹¹² [1982] B.C.D. Civ. 4171-01 (S.C.).

agreements made by spouses before marriage breakdown and those made after marriage breakdown. These considerations may be implicit in the distinctions the Act draws between various kinds of agreements.

Section 51 permits the courts to vary marriage agreements if their provisions are unfair. The *Family Relations Act* defines marriage agreements in terms of formal requirements of execution that must be observed in their making. The courts have held that a marriage agreement is any agreement that satisfies the requirements of s. 48 of the *Family Relations Act*. Consequently, s. 51 gives the courts jurisdiction to vary a marriage agreement made before marriage breakdown, or one made after marriage breakdown (the latter commonly being referred to as a separation agreement).

Section 54 gives the courts jurisdiction to vary an ante or post nuptial agreement that is not a marriage agreement. It would appear, consequently, that the Act distinguishes between spousal agreements solely on the basis of the formalities that attend their execution.

The *Family Relations Act* could be simplified, and its operation made more certain, by clarifying the status of spousal agreements under the Act. The various terms used to refer to spousal agreements should be deleted from the Act. In their place should be substituted language which clearly states the distinction to be drawn between formal spousal agreements and informal spousal agreements.

Whether it is desirable to permit review of spousal agreements is an issue that is further considered in Chapter XI of this Study Paper.

A. Introduction

The *Family Relations Act* provides that on marriage breakdown each spouse is entitled to a half interest in "family assets." "Family assets" are defined in section 45:

Family assets defined

45. (1) Subject to section 46, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting the generality of subsection (2), the definition of family asset includes

- (a) where a corporation or trust owns property that would be a family asset if owned by a spouse,
 - (i) a share in the corporation; or
 - (ii) an interest in the trust owned by the spouse;
- (b) where property would be a family asset if owned by a spouse, property
 - (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or
 - (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
- (c) money of a spouse in an account with a savings institution where that account is ordinarily used for a family purpose;
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; or
- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

Property owned by one or both spouses is a family asset if it is ordinarily used for a family purpose. Some kinds of property are not "used," so the definition refers specifically to three kinds of property that are characterized as family assets: money in a savings institution if the account is used for a family purpose; an interest in an annuity or pension plan; and an interest in a "venture" to which the spouse has directly or indirectly contributed.

Section 46 also helps define family assets. It provides that business assets owned by one spouse are not family assets if the other spouse did not directly or indirectly contribute to their acquisition or operation. The term "indirect contribution" is also defined. Section 46 provides as follows:

Excluded business assets

46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 45(3)(e) or subsection (1), an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

The approach adopted by the Act to determine what property may be divided may be summarized briefly. Two classes of assets are family assets regardless of whether the spouse claiming an interest in them made any contribution to their acquisition or upkeep. The first class encompasses any

asset used for a family purpose.¹ A second class of assets are deemed to be family assets. This class is limited to annuities and pension plans, which are apparently regarded as family assets by their very nature.² Business assets and ventures are family assets if the non-owning spouse contributed to them.

Five expressions, used in section 45, are undefined:

- (1) "family purpose";
- (2) "contribution";
- (3) "effective management of household and child rearing responsibilities";
- (4) "ordinary use"; and
- (5) "venture."

Although the courts have provided rough definitions of some of these expressions,³ the lack of statutory definitions has inevitably led to litigation.

The statutory scheme respecting business assets deserves special mention. When contribution has been proved pursuant to sections 45 and 46, the business asset in issue then becomes a family asset, ostensibly subject to the same rules governing entitlement to other property characterized as family assets because of use for a family purpose. Nevertheless, decisions respecting the division of business assets are sometimes difficult to reconcile with decisions concerning other classes of family assets. Many of these decisions can best be explained by an apparent reluctance of courts to treat business assets in the same way as other family assets.

B. Problems of Characterization

1. SOME EXAMPLES

The Act, for the most part, provides a general definition of family assets, and it is left to the courts to consider on a case by case basis whether any

¹ Section 45 specifically provides that money in a savings institution is a family asset if used for a family purpose, but does not mention other assets in which savings are often invested (e.g., Canada Savings Bonds.) The Act is silent on whether investments are to be treated as other assets, or as ventures (i.e., does their status depend upon use for a family purpose, or contribution?) The cases are divided on what amount of use for a family purpose is necessary before a bank account will become a family asset. In *Hackett v. Hackett*, (1984) 43 R.F.L. (2d) 5 (B.C.S.C.) it was held that reserves of cash contributed to family stability and in that sense all savings are used for a family purpose. In *Callison v. Callison*, [1985] B.C.D. Civ. 1647-01 (S.C.) interest from a term deposit was used for family purposes. The interest, not the term deposit, was held to be a family asset.

² A lump sum payment made in lieu of pension benefits, however, is not a family asset: *Penner v. Penner*, (1984) 42 R.F.L. (2d) 402 (B.C.C.A.); cf. *Hill v. Hill*, (1985) 32 A.C.W.S. (2d) 425 (B.C.S.C.). In *Hackett, ibid.*, an R.R.S.P. was not a family asset because the husband had intended to hold it in trust for the benefit of the children of the marriage. The court has no jurisdiction over a pension located in another jurisdiction: *Britten v. Britten*, (1983) 50 B.C.L.R. 131, 37 R.F.L. (2d) 329 (S.C.). In *Artus v. Artus*, [1985] B.C.D. Civ. 1676-03 (S.C.), it was held that a disability pension is a family asset, but in the circumstances the non-owning spouse should not have an interest in it.

³ "Family purpose" has been held to mean a purpose connected with the whole family and not one or more individuals in it: *McLennan v. McLennan*, (1980) 20 B.C.L.R. 193, 17 R.F.L. (2d) 44 (S.C.); but there are cases where property used solely by one spouse has been characterized as a family asset: see, e.g., section B.5 "Hobbies;" using a portion of separate property for a family purpose may not render the separate property family assets: see, e.g., *Rushton v. Rushton*, (1984) 38 R.F.L. (2d) 308 (B.C.S.C.); *Noble v. Noble*, (1984) 50 B.C.L.R. 341 (S.C.). "Venture" entails an element of risk. In *Richardson v. Richardson*, (1983) 32 R.F.L. (2d) 82 (B.C.S.C.) *off d.* (1984) 59 B.C.L.R. 162 (C.A.) the wife received an inheritance after litigation on which the husband assisted. It was held that his contributions were not contributions to a venture because there was no risk to the family; see also *Clark v. Clark*, [1984] B.C.D. Civ. 1676-07 (S.C.). "Contribution" appears to include contributions made by a spouse after separation. In *Robertshaw v. Robertshaw* (no. 2), (1979) 17 B.C.L.R. 137, [1980] 2 W.W.R. 215 (S.C.), "venture" was interpreted to include any business; see also *Jackh v. Jackh*, (1980) 22 B.C.L.R. 182, 18 R.F.L. (2d) 310 (S.C.); *Grant v. Grant*, (1982) 28 R.F.L. (2d) 457 (B.C.S.C.); *Davis v. Davis*, [1984] B.C.D. Civ. 1654-03 (S.C.); *Tratch v. Tratch*, (1981) 30 B.C.L.R. 98 (S.C.); cf. *Johnson v. Johnson*, [1984] B.C.D. Civ. 1654-05 (C.A.) where the Court of Appeal declined to redistribute after separation of six years. In *Callison, supra*, n. 1, the wife deposited her savings in her husband's term deposit. That was not a direct contribution, but a means of obtaining a higher interest rate on her separate property. Before property can become a family asset, the court must find that it was "ordinarily used" for a family purpose. There is no definition of that expression in the Act. The case law is extremely sparse. In *Groves v. Groves*, [1981] B.C.D. Civ. 1647-34 (S.C.), a spouse withdrew dividends from a life insurance policy and used the funds for a family purpose. The policies were not family assets. A single incident of use was held not to constitute regular or ordinary use; see also *McDougall v. McDougall*, (1982) 39 B.C.L.R. 88, 29 R.F.L. (2d) 274 (S.C.); *Schlatter v. Schlatter*, (1982) 41 B.C.L.R. 278, 32 R.F.L. (2d) 119 (C.A.); cf. *Hanuse v. Hanuse*, (1984) 40 R.F.L. (2d) 250 (B.C.S.C.), where intention to use for a family purpose was the controlling factor. In *Formosa v. Formosa*, (1983) 50 B.C.L.R. 81, 37 R.F.L. (2d) 217 (C.A.) and *Underhill v. Underhill*, (1983) 45 B.C.L.R. 244, 34 R.F.L. (2d) 419 (C.A.) it was held that an unrealized intention to use an asset for family purposes does not make the asset a family asset. In *Elson v. Elson*, (1983) 49 B.C.L.R. 297, 37 R.F.L. (2d) 150 (C.A.), "ordinarily used" was defined as customary, as opposed to casual or occasional use. Infrequent use may still be "ordinarily used" if it is not unusual or uncumbersome. Infrequent use, however, may be grounds to reapportion the asset under s. 51: *Wallace v. Wallace*, [1985] B.C.D. Civ. 1647-06 (S.C.). Use for a family purpose may only render a portion of the asset a family asset: *Murphy v. Murphy*, (1984) 44 R.F.L. (2d) 60 (B.C.S.C.).

particular asset qualifies as a family asset.⁴ Some of the reasoning required by this process has proven to be quite subtle and, not surprisingly, the decisions arrived at are sometimes inconsistent. For example, severance pay and an award of damages for wrongful dismissal were held not to be family assets,⁵ although a lump sum payment to a spouse as an incentive to take early retirement, functionally identical, was characterized as a family asset because the decision to retire affected pension rights.⁶ In a British Columbia case, a profit-sharing plan was characterized as a family asset.⁷ In Ontario, which has similar legislation, a profit-sharing plan was characterized as a business asset.⁸

Some other kinds of property or financial interests which have been excluded from family assets are: an income tax refund,⁹ a farm,¹⁰ a membership in a club,¹¹ degrees or diplomas,¹² and a personal injury award.¹³

2. GIFTS

In most jurisdictions which grant spouses shared rights in property, assets acquired from a third party by gift are regarded as separate property.¹⁴ This approach has merit. A gift from a third party remains separate property because the non-owning spouse's contributions can have no relationship with its acquisition.

In British Columbia, the means by which property is acquired is taken into account when determining an appropriate division of property, but does not appear to have significance in determining whether the property is divisible. Whether a gift is divisible depends upon whether it was used for a family purpose.

In British Columbia, when a gift is not used for a family purpose it may still be characterized as a family asset if it was given to both spouses.

⁴ The spouse opposing a claim under s. 43 has the onus of proving that the property in question was not used for a family purpose: s. 47. If the spouse is unable to prove that an asset is not a family asset, the evidence may still supply grounds for reapportionment: *Elsom, ibid.*

⁵ *Ledoux v. Ledoux*, (1983) 50 C.B.R. (n.s.) 241 (S.C.); *Dzuba v. Dzuba*, [1983] B.C.D. Civ. 1676-04 (S.C.); *Hickley v. Hickley*, [1982] B.C.D. Civ. 1645-03 (S.C.); *Stephens v. Stephens*, [1985] B.C.D. Civ. 1647-02 (S.C.); see also *O'Riordan v. O'Riordan*, (1985) 46 R.F.L. (2d) 180 (B.C.S.C.).

⁶ *Penner v. Penner*, (1983) 34 R.F.L. (2d) 443 (B.C.S.C.), *rev'd*, (1984) 42 R.F.L. 402 (B.C.C.A.) on the basis that at the time of the election the pension was not a family asset; see, however, *Hill v. Hill*, *supra*, n. 2.

⁷ *Williams v. Williams*, (1982) 26 R.F.L. (2d) 325 (B.C.C.A.); cf. *Schmidt-Ramelow v. Schmidt-Ramelow*, [1985] B.C.D. Civ. 1647-05 (B.C.S.C.).

⁸ *Sobot v. Sobot*, (1980) 15 R.F.L. (2d) 225, 230 (Ont. U.F.C.).

⁹ *Alcock v. Alcock*, [1984] B.C.D. Civ. 1654-04 (S.C.).

¹⁰ *Newman v. Newman*, [1984] B.C.D. Civ. 1648-01: a farm falls into the definition of "business asset." In *Murphy, supra*, n. 3, however, the court found that a portion of land was used for family purposes, and that portion, although not subdivided, was a family asset.

¹¹ *Noble, supra*, n. 3.

¹² *Jarvis v. Jarvis*, (1982) 32 R.F.L. (2d) 144 (B.C.S.C.); *Jirik v. Jirik*, (1983) 37 R.F.L. (2d) 385 (B.C.S.C.); cf. *Wolverton v. Wolverton*, (1980) 24 B.C.L.R. 33 (S.C.). It has been held that contribution to a degree or diploma is a factor to consider when awarding maintenance: *Thew v. Thew*, (1982) 45 B.C.L.R. 399 (S.C.), but this position is not beyond doubt; see Chapter V, Section D, INTANGIBLE ASSETS.

¹³ At least where the funds have not yet been received: *Burns v. Burns*, (1981) 31 B.C.L.R. 59 (S.C.); *Sidhu v. Sidhu*, [1981] B.C.D. Civ. 1645-14 (S.C.); *Idiens v. Idiens*, (1985) 32 A.C.W.S. (2d) 190 (B.C.S.C.). In *Douglas v. Douglas*, (1984) 43 R.F.L. (2d) 262 (B.C.S.C.), a personal injury settlement was used for family purposes, and the non-owning spouse received a 1/3 interest in it. A number of jurisdictions resolve this issue by legislation. Generally, a damage award for personal injuries is regarded as separate property except to the extent that it is intended to compensate both spouses for a loss; see, e.g., Alberta, *Matrimonial Property Act*, R.S.A. 1980 c. M-9, s. 7; Manitoba, *The Matrimonial Property Act*, S.M. 1978 c. 24/M45, s. 8; Nova Scotia, *The Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 4. In U.S. community of property jurisdictions, the general rule is that damages for future earnings and actual medical expenses are community property and damages for pain and suffering and loss of amenities are separate property.

¹⁴ See, e.g., *Matrimonial Property Act*, R.S.A. 1980 c. M-9, s. 7; *The Matrimonial Property Act*, S.M. 1978, c. 24/M45, s. 7; *Matrimonial Property Act*, S.N.B. 1980, c. M-1.1, s. 1; *The Matrimonial Property Act*, S.Nfld. 1979, c. 32, s. 16; *The Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 4; *The Matrimonial Property Act*, S.S. 1979, c. M-61, s. 23. Gifts between spouses are usually regarded as divisible. Cf. *Matrimonial Property Act*, S.N.B. 1980, c. M-1.1, ss. 1, 6, where the court has discretion to exempt gifts made between spouses from distribution. In Saskatchewan, the courts are directed to consider previous distributions of matrimonial property by gift when determining an appropriate division: s. 21(2)(i). In the United States, community property systems tend to distinguish between gifts between spouses of separate property and of community property.

Expensive gifts, however, are seldom given to one spouse to the exclusion of the other. It has been held that a gift not specifically given to one spouse to the exclusion of the other is a family asset.¹⁵ A more reasonable approach might be to provide that gifts from third parties, whether or not they are used for a family purpose, are separate property unless the non-owning spouse can establish that the donor intended to benefit both spouses, an approach adopted in Manitoba.¹⁶ This approach, however, also has problems. The donor's recollection of his intention, after a dispute arises, may well be unreliable. Moreover, the test of "benefit" is ambiguous. A gift of a home would clearly benefit both spouses. Would an oil painting benefit both spouses? Does this test depend on the use the recipient makes of the gift?

A general rule that a gift to one spouse by a third party is that spouse's separate property is consistent with dividing family property based on a theory of contribution. Problems may well arise determining to whom a gift was made, but these problems are likely to be easier to resolve than those posed by the family purpose test.

Gifts between spouses represent different analytic problems. Again, under the *Family Relations Act*, if the gift is used for a family purpose it is a family asset and subject to division between the spouses. Cases concerned with characterizing the nature of a gift between spouses disclose some of the defects of the family purpose test.

A simple approach would be to adopt a rule that provides that all gifts between spouses remain family property, or become the recipient's separate property. *Dixon v. Dixon*¹⁷ suggests that gifts become the recipient's separate property. This approach is consistent with most people's conception of a gift. The donor gives away whatever interest in the property he has. *Sidhu v. Sidhu*¹⁸ suggests that gifts remain family property. This approach suggests that the donor gives away only the control and management of property for the time being, while retaining an interest in the property.

In practice, the courts have looked to a number of factors in order to characterize gifts as family assets or separate property. The use made of a gift is often determinative. In several cases it has been held, for example, that gifts of jewellery and furs, if not used for a family purpose, are not family assets.¹⁹ In *Hauptman v. Hauptman*,²⁰ the wife's jewellery was worn to impress the husband's colleagues. That was considered to be a family purpose and the jewellery was characterized as a family asset.²¹ The parties' intentions may also be significant. In *Grant v. Grant*,²² a gift of silverware and china was held to be the wife's separate property because, among other things, she intended to leave those assets to her children.

The issue of characterizing gifts seldom arises unless the gift is valuable. In that case, frequently, the asset in question is regarded by the spouses as an investment.²³ Investments present equally difficult problems of characteriza-

¹⁵ *Arsena v. Arsena*, (1980) 25 B.C.L.R. 128 (S.C.); *Bulich v. Bulich*, [1982] B.C.D. Civ. 1649-01 (S.C.); for a discussion of the early cases see *Laxton v. Laxton*, (1981) 26 B.C.L.R. 57, 21 R.F.L. (2d) 126 (S.C.); *Wallace v. Wallace*, *supra*, n. 3; *McNabb v. McNabb*, [1985] B.C.D. Civ. 1676-11 (B.C.S.C.).

¹⁶ *Supra*, n. 14.

¹⁷ (1982) 37 B.C.L.R. 292 (S.C.).

¹⁸ *Sidhu*, *supra*, n. 13.

¹⁹ *Simpkins v. Simpkins*, (1981) 30 B.C.L.R. 340 (S.C.), *rev'd*, (1982) 41 B.C.L.R. 75 (C.A.); *Hunt v. Hunt*, (1981) 27 B.C.L.R. 134 (S.C.); *Norton v. Norton*, (1983) 34 R.F.L. (2d) 265 (B.C.S.C.).

²⁰ (1981) 32 B.C.L.R. 119 (S.C.); see also *Gandham v. Gandham*, (1985) 46 R.F.L. (2d) 162 (B.C.S.C.).

²¹ *Cf. Fong v. Fong*, (1983) 45 B.C.L.R. 222 (C.A.).

²² *Supra*, n. 3.

²³ *Cf. Hachett*, *supra*, n. 1: a contribution of money towards a spouse's stamp collection did not make the collection a family asset. There was no common intention to regard the stamp collection as an investment and, consequently, it was not a venture. The contribution, however, was sufficient to support a constructive trust.

tion. Usually the dual nature of a gift is overlooked. Perhaps a test common to both gifts and investments should be developed to resolve these problems.

3. INVESTMENTS

The *Family Relations Act* does not refer to investments. It speaks of business assets and ventures. The Act does not define what is meant by the term venture, although it probably encompasses any asset which is used for profit but which is not ordinarily used in a business. Consequently, a "venture" probably includes saving bonds, stocks and real property acquired for investment or speculation. In this Study Paper, the term investment is used as being synonymous with the term venture.

Unless there is direct or indirect contribution, a spouse has no interest in another spouse's investments.²⁴ There may be circumstances, however, where an investment will be transformed into a family asset in the absence of contribution.

In *Schoenfeld v. Schoenfeld*,²⁵ for example, bonds were held to be family assets because both spouses intended to share everything.²⁶ That was the court's characterization of the circumstances. In fact, the husband had carefully kept the bonds separate from family assets and only a portion of the income was used for family purposes. It has been held in a series of cases that the use of income from an investment for a family purpose does not make the investment a family asset.²⁷ The result in *Schoenfeld*, consequently, is surprising.

4. INHERITED PROPERTY

Like gifts, assets received by an inheritance represent a windfall to their recipient, and in many other jurisdictions, inheritances are regarded as separate property.²⁸ In British Columbia, property received by inheritance is a family asset if it is used for a family purpose,²⁹ but courts have also relied upon other factors in determining whether such property is a family asset.

In *Laxton v. Laxton*,³⁰ the husband inherited land. It was found that the husband's father would not have left him the land, but for the wife's "driving force" in encouraging him to farm land adjacent to the inherited property. Her contribution in "driving" the husband on was held to have constituted a contribution to the acquisition of the inherited property, on which neither the husband nor the wife had apparently ever set foot. In *Schoenfeld v. Schoenfeld*,³¹ mentioned in the last section, bonds inherited by the husband were never used for a family purpose but were nevertheless characterized as family assets. The court found that, notwithstanding that the husband carefully declined to use the capital of the inheritance for family purposes, both parties

²⁴ *Vance v. Vance*, [1981] 6 W.W.R. 431, 23 R.F.L. (2d) 397 (B.C.S.C.). See also *Blockberger v. Blockberger*, (1981) 30 B.C.L.R. 78, 23 R.F.L. (2d) 177 (S.C.) *var'd* (1983) 48 B.C.I.R. 235 (B.C.C.A.).

²⁵ [1984] B.C.D. Civ. 1650-01 (S.C.).

²⁶ See also *Tshacs v. Tshacs*, [1982] B.C.D. Civ. 1640-01 (S.C.); *Jones v. Jones*, [1982] B.C.D. Civ. 1640-09 (S.C.); *Hanberg v. Hanberg*, [1984] B.C.D. Civ. 1647-07 (S.C.).

²⁷ *McDougall*, *supra*, n. 3; *Jirik*, *supra*, n. 12; *Blockberger*, *supra*, n. 24; *Trebra-Lindenau v. Trebra-Lindenau*, [1982] B.C.D. Civ. 1647-11 (S.C.). The cash surrender value of life insurance policies is not a family asset. Life insurance is not owned for a family purpose. The policy is a matter of contract between the insured and the insurer: *Groves*, *supra*, n. 3; *McKinney v. McKinney*, (1980) 17 R.F.L. (2d) 308 (B.C.S.C.).

²⁸ See, e.g., *Alberta*, *supra*, n. 14, s. 7; *Manitoba*, *supra*, n. 14, s. 7; *New Brunswick*, *supra*, n. 14, s. 1; *Newfoundland*, *supra*, n. 14, s. 16; *Nova Scotia*, *supra*, n. 14, s. 4; *Saskatchewan*, *supra*, n. 14, s. 23. In *Manitoba* and *Saskatchewan*, an inheritance is distributable if the deceased intended to benefit both spouses, or profit associated with the inheritance is distributable if that was in keeping with the deceased's intentions.

²⁹ See, e.g., *Groves*, *supra*, n. 3, where inheritance was kept in a term deposit. An inheritance is not normally something to which a spouse has contributed: *Simpkins*, *supra*, n. 16; in *Norton v. Norton*, (1983) 34 R.F.L. (2d) 265 (B.C.S.C.), coins inherited by the husband from his father were held to be his separate property without discussion.

³⁰ *Supra*, n. 15.

³¹ *Supra*, n. 25.

intended that everything should be shared. This conclusion might in part have been based on the fact that a minor inheritance received by the wife had been shared by the husband.

5. HOBBIES

The definition of a family asset includes property used by a spouse for a family purpose.³² The Act does not define "family purpose," and there is some doubt whether a hobby enjoyed by one spouse to the exclusion of the rest of the family qualifies as a "family purpose." In some cases, courts characterize property used by one spouse to the exclusion of the family as non-family assets for that reason alone.³³ In other cases, sole use by one spouse is given little weight.³⁴

It has been held that the portion of a hobby which is displayed in the home is a family asset,³⁵ while that portion which is stored is not a family asset. Display in the home appears to constitute use for a family purpose. This test, however, is not necessarily determinative. In *Simpkins v. Simpkins*,³⁶ for example, a sword collection on display in the home was not a family asset since no one in the family, other than the husband, was interested in it.

6. PENSIONS

Pensions have been subject to extensive judicial comment which has resulted in a treatment that differs from other kinds of family assets. Pension plans present unique problems. Depending on the terms of the plan, they are assets which may have only nominal value at the time of marriage breakdown, perhaps reflecting only the value of the contributions made by the worker. Frequently, a pension will have little or no value until the worker retires.

The problem of determining the proper division of a pension plan has been considered by the courts on many occasions. Several different approaches have been adopted. The case law dealing with pension plans may be divided into three categories: 1) pensions which are not family assets under the *Family Relations Act*; 2) pensions which have not vested at the time of the application to divide the family assets; and 3) pensions which have vested and under which income is being received.

(a) Pensions Which Are Not Family Assets

Section 45(3)(d) of the *Family Relations Act* defines a family asset as including the right of a spouse under a pension. The *Family Relations Act* requires neither use for a family purpose nor direct or indirect contributions to the pension for it to be a family asset.

On the face of the Act, consequently, there would appear to be little merit in a submission that a pension was not a family asset. This issue, however, arises occasionally.

In *Nevin v. Nevin*,³⁷ the husband's D.V.A. pension was held not to be a family asset as it represented compensation for bodily injury suffered during

³² Apparently, property given to a child by the parents is not a family asset; see *Sobot*, *supra*, n. 8, at 230, an Ontario case, where an organ was given to a child. Neither parent had a claim upon the organ, either as a family or non-family asset.

³³ See, e.g., *Robertshaw*, *supra*, n. 3; *Mayuk v. Mayuk*, (1981) 25 B.C.L.R. 57, at 61 (S.C.); Photographic equipment used solely by the husband was not a family asset even if the husband earned income from his hobby and the income was used for a family purpose; see also *Silverwood v. Silverwood*, (1981) 27 B.C.L.R. 392 (S.C.). In *Hauptman v. Hauptman*, (1981) 32 B.C.L.R. 119, [1982] 2 W.W.R. 62 (S.C.), the photographic equipment of the husband was held to be a family asset.

³⁴ *Hauptman*, *ibid.*; *Bregman v. Bregman*, (1978) 21 D.L.R. (2d) 722, 7 R.F.L. (2d) 201 (Ont. F.L.D.).

³⁵ *Hollinger v. Hollinger*, [1982] B.C.D. Civ. 1647-09 (S.C.); *Bregman*, *ibid.* (a rug collection, not all of which could be displayed at the same time); *Mullen v. Mullen*, (1982) 28 R.F.L. (2d) 272 (N.B.Q.B.).

³⁶ *Supra*, n. 19.

³⁷ (1980) 24 B.C.L.R. 127 (S.C.).

military service.³⁸ In *Artus v. Artus*,³⁹ on the other hand, the husband's disability pension benefits from his military service before marriage were held to be a family asset. Section 51 was applied, however, and the wife was awarded no interest in the pension.

*(b) Valuation and Division of Pensions
Which Have Not Vested*

Once a person becomes entitled to receive pension benefits, there is little difficulty in valuing the pension for the purpose of dividing it between the spouses. Where a person is not yet entitled to receive pension benefits, a number of problems must be resolved to reach a fair valuation and division. The British Columbia Court of Appeal in *Rutherford v. Rutherford*⁴⁰ settled an important initial issue in the interpretation of s. 45(3)(d) of the *Family Relations Act*. It stated:⁴¹

It has been argued that there must be a present right to a pension and that the pension must have vested. I would read "a right of a spouse under an annuity or a pension" to include any right, even one that can be said to be inchoate, contingent, immature, or not vested.

Rutherford also suggested two methods of compensating a non-owning spouse for an interest in a pension under which benefits were not yet payable. The first method involved compensation for an interest in a pension by taking that into account when dividing other assets. The second method involved the use of a formula for determining spousal entitlement to a pension.

(i) Pension Entitlement Offset By Other Assets

In *Rutherford*, the Court of Appeal stated:⁴²

The purpose in each case is to achieve a fair division. That might include awarding the whole of the pension to the one spouse where its value can be offset by other assets . . . I would favour that approach but the trial judge correctly concluded that the assets in our case did not make that possible.

This approach has been adopted in a number of cases. Frequently the owning spouse will be permitted to retain his pension and the non-owning spouse will be awarded a greater share in the matrimonial home⁴³ or other family assets,⁴⁴ or receive a lump sum cash settlement.⁴⁵

One would expect that this approach would require a valuation of the pension. However, on occasion the courts have offset the non-owning spouse's pension entitlement with other assets in the absence of actuarial evidence of the pension's value.⁴⁶ In *Morgan v. Morgan*⁴⁷ both spouses contributed to pensions for seven years. The pensions were valued by reference to each spouse's actual contributions to them. Compensation was awarded to equalize the difference in the values of the pensions. However, in *Stokes v. Stokes*,⁴⁸ the

³⁸ See also *Jarvis v. Jarvis*, (1982) 32 R.F.L. (2d) 144 (B.C.S.C.); *Donald v. Donald*, (1981) 28 B.C.L.R. 240 (S.C.); *Arsenault v. Arsenault*, (1983) 46 R.F.L. (2d) 193 (B.C.S.C.).

³⁹ [1983] B.C.D. Civ. 1676-03 (S.C.).

⁴⁰ (1981) 23 R.F.L. (2d) 337, 30 B.C.L.R. 145 (C.A.).

⁴¹ *Ibid.*, at 342.

⁴² *Ibid.*, at 347.

⁴³ See, e.g., *Thom v. Thom*, (1980) 18 R.F.L. (2d) 175 (B.C.S.C.); *Peterson v. Peterson*, [1981] B.C.D. Civ. 1645-10 (S.C.); *La Rue v. La Rue*, [1982] B.C.D. Civ. 1654-02 (S.C.); *Deblens v. Deblens*, (1981) 30 B.C.L.R. 314 (S.C.); *Ingram v. Ingram*, (1982) 36 R.F.L. (2d) 213 (B.C.C.A.); *Kirby v. McDonald*, [1984] B.C.D. Civ. 1645-27 (S.C.).

⁴⁴ See, e.g., *Watts v. Watts*, (1981) 22 R.F.L. (2d) 309 (B.C.S.C.); *Carruthers v. Carruthers*, (1983) 35 R.F.L. (2d) 248 (B.C.S.C.); *Edwards v. Edwards*, [1983] B.C.D. Civ. 1676-11 (S.C.); *Bateman v. Bateman*, (1984) 42 R.F.L. (2d) 120 (B.C.C.A.).

⁴⁵ See, e.g., *Mobrey v. Mobrey*, [1982] B.C.D. Civ. 1645-04 (S.C.); *Morgan v. Morgan*, [1984] B.C.D. Civ. 1676-02 (S.C.); *Penner v. Penner*, (1984) 42 R.F.L. (2d) 402 (B.C.C.A.); *Lam v. Lam*, [1980] B.C.D. Civ. 1664-08 (S.C.).

⁴⁶ See, e.g., *Watts*, *supra*, n. 44; *Thom*, *supra*, n. 43; *Lam*, *ibid.*

⁴⁷ *Supra*, n. 45.

⁴⁸ (1983) 37 R.F.L. (2d) 186 (B.C.C.A.).

Court of Appeal ruled that the trial judge was in error to accept the value of a pension as the amount of contributions to it. Actuarial evidence, which the trial judge had refused to hear, should have been admitted to establish the present value of the pension.

In *Hauptman v. Hauptman*,⁴⁹ concern was expressed about "the unfairness of requiring a spouse to make a present payment on account of a benefit which he will receive only at some future date. . . ."⁵⁰ In refusing to compensate the non-owning spouse with a greater share of other assets, the importance of three factors was noted. First, the absence of actuarial evidence and the many underlying assumptions of such evidence made it inappropriate to refer the matter to the Registrar. Second, the only asset from which compensation could be paid was the matrimonial home, the use of which the husband and child required. Third:⁵¹

I have not overlooked the argument that Mrs. Hauptman may well predecease her husband, in which case she will receive no personal benefit in her husband's pension, failing an order for immediate payment of the present value of her share. However, there was no concrete evidence on Mrs. Hauptman's life expectancy, her doctor merely saying that she was always "at risk". It may also be noted that had the parties remained together, Mrs. Hauptman would not share in her husband's pension in the event she predeceased him. It must always be remembered that the property right in a pension such as this is not a present right, but a future right, subject to the contingencies of future happenings which may prevent either or both of the spouses from personally enjoying its fruition.

Mrs. Hauptman's share of the pension was determined as of the date of the hearing. Rather than award her the present value of that interest, she was held to be entitled to a proportionate share of the pension upon her husband's retirement.

The potential unfairness of awarding one spouse an increased interest in other family assets to offset a future pension entitlement has been discussed by the Court of Appeal in two cases.

In *Ingram v. Ingram*,⁵² which involved an eighteen year marriage, the trial judge declared each spouse to be entitled to an equal interest in the family assets. The family assets other than the husband's pension were valued at \$349,845.16. The present value of the pension was found to be \$83,170. The trial judge awarded the wife 55% of the family assets other than the pension. The additional 5% was compensation for the wife's interest in the pension but reflected an amount less than half its present value. This order was upheld on appeal.

In *Strahl v. Strahl*,⁵³ the Court of Appeal considered the dicta in *Rutherford* and the contrasting reasons for judgment in *Hauptman* and *Ingram*. The reasoning in *Hauptman* was adopted and the *Rutherford* formula applied in granting a future interest in the pension.

(ii) The *Rutherford* Formula

In *Rutherford*, the Court of Appeal adopted a formula for the division of a pension when it vests. In the circumstances, the pension was due to vest six months from the date of trial, when the husband reached the age of 55. However, the husband had an option of continuing to work until he reached age 65, delaying the receipt of the pension benefits. It was held that:

- (i) the date to value the pension in the circumstances was the date of separation.

⁴⁹ (1981) 32 B.C.L.R. 119 (B.C.S.C.).

⁵⁰ *Ibid.*, at 125.

⁵¹ *Ibid.*, at 125-6.

⁵² *Supra*, n. 43.

⁵³ (1985) 44 R.F.L. (2d) 189 (B.C.C.A.).

- (ii) the formula to value the share of the non-owning spouse was one half the years during which the owning spouse contributed divided by the total number of years of contribution required for the pension to vest.
- (iii) if there had been a substantial part of the pension earned before marriage, it might have led to a distribution other than equal because of ss. 51(c) and 51(f), but in this case there was no reason to segregate the small portion of the pension earned prior to marriage.
- (iv) the pension vested upon the husband at age 55. If he chooses to continue working until mandatory retirement at age 65, the wife is entitled to receive compensation in the amount of her interest on a monthly basis, in the amount she would have received had the husband retired at age 55.⁵⁴
- (v) the husband was declared to be trustee of the wife's interest in the pension.
- (vi) no order was made under section 52(2)(f) to provide security for the wife's interest but the door was specifically left open for such an order if circumstances later required it.

(iii) *Application and Variation of the Rutherford Formula*

The *Rutherford* formula has been applied in a number of cases with minor variations. The *Rutherford* formula has been varied by choosing the date for valuation of the pension as the date of the decree *nisi*,⁵⁵ the decree absolute,⁵⁶ and the date of trial.⁵⁷ The valuation date determines the number of years of contribution over which the non-owning spouse is entitled to a share.

In *Rutherford* it was held that the contribution to the pension prior to marriage was not a significant factor and no allowance was made for it. Several cases purporting to follow the *Rutherford* formula have exempted contributions made prior to marriage. In *Strahl v Strahl*,⁵⁸ for example, the Court of Appeal applied the *Rutherford* formula as follows:

$$\left[\frac{25}{35} \right] \times \left[\frac{1}{2} \right] \times (\text{monthly pension})$$

25 represents the number of years the parties cohabited and 35 represents the total years of service for the pension to vest. The husband had contributed to the pension for 5 years prior to the marriage. The effect of the judgment is that the portion of the pension brought into the marriage is not treated as a family asset.⁵⁹

In a number of cases the *Rutherford* formula has been applied to value a pension, but the non-owning spouse's interest is then varied under section 51. For example, in *Polglase v. Polglase*,⁶⁰ the non-owning spouse was entitled to 25.75% of the pension benefits in accordance with the *Rutherford* formula. Applying subsection 51(e), this was reduced to 15%, less any tax the owning

⁵⁴ See also *Hauptman*, *supra*, n. 48.

⁵⁵ In *Hamm v. Hamm*, [1984] B.C.D. Civ. 1676-01 (S.C.) the date of the decree *nisi* was applied in valuing the pension provided that the wife repay the husband one half the pension contributions made since the date of separation five years before. Otherwise the date of separation would be applied.

⁵⁶ *Silverwood v. Silverwood*, (1981) 27 B.C.L.R. 392 (S.C.).

⁵⁷ *Hauptman*, *supra*, n. 48; *Edgar v. Edgar*, (1984) 39 R.F.L. (2d) 436 (B.C.S.C.); *Gifford v. Gifford*, (1985) 44 R.F.L. (2d) 375 (B.C.S.C.); *Strahl*, *supra*, n. 53; *Hatch v. Hatch*, [1985] B.C.D. Civ. 1676-02 (S.C.).

⁵⁸ *Supra*, n. 53.

⁵⁹ See also *Lett v. Lett*, [1985] B.C.D. Civ. 1664-03 (S.C.); cf. *Stokes v. Stokes*, (1985) 46 R.F.L. (2d) 207 (B.C.C.A.). This approach would exempt from distribution a pension which was wholly earned before marriage.

⁶⁰ [1980] B.C.D. Civ. 1647-42 (S.C.).

spouse would be obliged to pay. The owning spouse was given the option of paying \$18,000 in settlement of this future interest.⁶¹

The *Rutherford* formula has also been applied in circumstances where it is not possible to determine the present value of pension benefits. Actuarial assessments can vary dramatically depending on the assumptions relied upon.⁶² It has also been held that evidence of pension valuation is unnecessary to invoke the *Rutherford* formula.⁶³

In *Edgar v. Edgar*⁶⁴ a significant departure was made from the *Rutherford* formula. It was held that:⁶⁵

Because the husband's total years of contribution are not yet known, I do not think the *Rutherford* formula is appropriate. Instead I award to the wife one half of the pension benefits which would have been payable as at 1st April 1984, the closest whole month to the date of trial, as if the husband were then 55 years of age and on the basis of a joint and one-half survivor election. Payments will commence from the husband's actual 55th birthday on 8th January 1989. In addition, the plaintiff will also receive one half the value of any ad hoc benefits added to such a pension as if it were a pension in progress commencing 1st April 1984. The wife will not benefit from ad hoc benefits added to future pensions after that date, since those will be based primarily upon the husband's future average income earned in years after the triggering event. The wife has the benefit of the latest ad hoc adjustment to the future pension made on 1st January 1984, so she is up-to-date.

The defendant may not in fact choose to retire on his 55th birthday. In that case he will pay the wife compensation in monthly sums equivalent to her entitlement to be calculated as set out above. The defendant has been punctual in maintenance payments but the future may produce new and different relationships. The wife is entitled to be secured for her payments until the pension in fact becomes payable. She will therefore have, and the husband will execute, a mortgage security over the family residence. It will be not lower than a second mortgage security and will be in a form to be approved by counsel. It will secure monthly payments by the husband to the wife, to be calculated as above, and to be made until such time as the monthly pension benefits begin to be paid. Then it will be discharged and replaced by the security of the actual pension. The husband is hereby declared to be a trustee of any pension payments in fact paid in trust during his life, to pay to the wife from each such payment her share as calculated above. He is also directed at such time as he elects a payment option under the pension to elect an option which will yield, during the life of the plaintiff and defendant, or the survivor of them, a monthly amount not less than the wife's share, calculated as above. He is also directed to take any necessary steps to ensure through the pension trustees that if he predeceases the wife an amount equal to her share of the pension, calculated as above, shall continue to be paid to her so long as she lives.

In the event the husband should die before age 55, a small death benefit replaces the pension payments. In such event, one half of the benefit, calculated as of 1st April 1984, will go to the plaintiff and the defendant is declared trustee of any such benefit and is ordered to provide by direction to the plan's trustees or by his estate for its payment to the wife in the event of his death.

The cost of drawing and registering the mortgage security shall be for the wife's account. The parties will have leave to seek any necessary directions with respect to the mortgage and with respect to the terms of the trust I have imposed upon the husband. If any further actuarial calculations are required the parties have leave to submit them with a request for further directions.

(c) Pensions Which Have Vested and Under Which Income Is Being Received Prior to Separation

In the vast majority of cases involving pensions under which benefits are currently being received, the income stream is treated as a family asset, subject to reapportionment under section 51.⁶⁶

⁶¹ See also *Barry (Bogvo) v. Barry (Bogvo)*, (1985) 44 R.F.L. (2d) 334 (B.C.C.A.); *Wood v. Wood*, [1984] B.C.D. Civ. 1645-25 (S.C.); *Hollywood v. Hollywood*, (1982) 28 R.F.L. (2d) 367 (B.C.S.C.).

⁶² *James v. James*, [1985] B.C.D. Civ. 1676-06 (S.C.).

⁶³ *Kannigan v. Kannigan*, (1984) 39 R.F.L. (2d) 38 (B.C.S.C.).

⁶⁴ (1984) 39 R.F.L. (2d) 436 (B.C.S.C.).

⁶⁵ *Ibid.*, at 438-40.

⁶⁶ See, e.g., *White v. White*, (1981) 21 R.F.L. (2d) 330 (B.C.S.C.); *Brown v. Brown*, [1981] B.C.D. Civ. 1647-35 (S.C.); *Skinner v. Skinner*, [1981] B.C.D. Civ. 1647-38 (S.C.); *Bouch v. Bouch*, (1983) 36 R.F.L. (2d) 443 (B.C.S.C.); *Arsenault*, *supra*, n 38. See however *Christensen v. Christensen*, (1980) 19 R.F.L. (2d) 240 (B.C.S.C.); see also *supra*, n. 37 and 38: for cases where the pension was not a family asset.

In these cases, pension contributions made prior to marriage have been treated like any other asset brought into a marriage. For example, in *Skinner v. Skinner*,⁶⁷ a twenty-seven year marriage, the owning spouse had contributed to the pension for 10 years prior to the marriage. This was not sufficient ground to vary equal entitlement to the monthly benefits.⁶⁸

The *Rutherford* formula has generally been considered inappropriate where pension benefits are payable prior to separation. One notable exception to this general rule is the case of *Altin v. Altin*.⁶⁹ In *Altin* it appears that counsel agreed to the application of the *Rutherford* formula in valuing the respective shares of the pension.

The practice of offsetting pension entitlement with other assets has only been infrequently considered in these circumstances. In *Rushion v. Rushion*,⁷⁰ counsel argued for a lump sum settlement in lieu of sharing the monthly pension benefits. It was held:⁷¹

To order the plaintiff to pay any sum such as this [\$69,000] would require him to pay that sum out of the proceeds he receives from the house which, in my opinion, would mean he would have little capital with which to obtain new accommodation and little capital from which to produce revenue for his maintenance. I have in mind that the pension which he receives of approximately \$1,300 may dwindle with inflation, and it is to be borne in mind that whereas *ex gratia* increases have been made in the pension, there is no set indexing figure for it.

I also consider that it may be unfair to force the plaintiff in this action to lay out a large sum to prepay the pension when one looks at the possibility that if he died immediately thereafter, his wife would have received the lump sum and a pension would continue to be paid to her for the rest of her life. The plaintiff's estate would be greatly reduced if this method were used.

Where both spouses have pensions and only the husband is receiving benefits, the Court of Appeal, in *Penner v. Penner*,⁷² awarded a lump sum equalization payment from the husband to the wife. The facts of this case are unusual. The spouses divided the family assets by a separation agreement. The agreement, however, was silent on the pension. The separation agreement was pleaded in the statement of defence as a final settlement but that issue was not argued at trial. The Court of Appeal held it was too late to raise this issue on appeal.⁷³ This case is also significant for its holding that a lump sum payment received as an inducement to early retirement and in lieu of pension benefits is not a family asset.

(d) General Comment on Pensions

The *Family Relations Act* is silent on whether a distinction is to be made between different kinds of family property, such as pension plans and matrimonial homes. Decisions on pension plans create rules which are neither authorized nor forbidden by the Act. One may question whether principles governing the division of pensions should differ from those that govern distribution of family property generally.

The *Rutherford* formula for determining entitlement suggests that the value of the pension brought into the marriage may be excluded, and several courts have done so. This general rule is inconsistent with the approach the courts are to adopt in determining divisible family property. Other kinds of pre-marital property brought into the marriage, for example, are not excluded

⁶⁷ *Ibid.*

⁶⁸ See also *Brown, ibid.*; cf., *Edgar, supra*, n. 57.

⁶⁹ (1982) 27 R.F.L. (2d) 377 (B.C.S.C.).

⁷⁰ *Supra*, n. 3.

⁷¹ *Ibid.*, at 313-4.

⁷² (1984) 42 R.F.L. (2d) 402 (B.C.C.A.).

⁷³ See also *Christensen, supra*, n. 66. Cf., *Little v. Little*, (1982) 29 R.F.L. (2d) 370 (B.C.S.C.); *Townsend v. Townsend*, (1983) 37 R.F.L. (2d) 46 (B.C.S.C.).

from division. That is a factor the courts are to take into account only when determining a fair share of family property, and not when determining what property is divisible. It may, of course, be argued that no property brought into the marriage should be divisible between the spouses, since the non-owning spouse cannot have contributed to its acquisition. It is difficult to see why that approach has been adopted for pensions, however, and not for other kinds of family assets.

The British Columbia Court of Appeal has recently held that it is incorrect to reapportion specific assets.⁷⁴ The proper method is to consider the value of all family assets and determine entitlement as a portion of that value. That approach is inconsistent with judicial treatment of pensions under the *Family Relations Act* and it remains to be seen whether it will alter the principles applied by the courts in this context.

C. Once a Family Asset Always a Family Asset?

The *Family Relations Act* adopts a system of deferred community of property. During marriage, both spouses are entitled to their separate property. After marriage breakdown, they become entitled to a share of family assets. Whether an asset is a family asset depends generally upon one of two tests: use for a family purpose or contribution.

These tests, of course, apply to matters arising during marriage. Spousal entitlement, however, does not exist until after a triggering event has occurred.

Frequently, during marriage, property is sold or exchanged for other property. An issue which has been addressed in only a handful of cases is whether a spouse can alter the characterization of property, to convert a family asset into a non-family asset, before marriage breakdown. This is an important issue, which requires resolving what interest the non-owning spouse has in family assets before marriage breakdown. Under the *Family Relations Act*, spouses are entitled to their separate property until the occurrence of a triggering event.

It has been held that:⁷⁵

Nothing can be done to the asset itself or the proceeds from it, subject to the provisions of section 43(3)(a) and (b) [separation agreement or section 44 declaration] that will take away from this essential quality. The real issue becomes how, on the facts in each case, s. 51 and s. 52 of the Act affect the apportionment of the asset.

This suggests that the courts are prepared to recognize spousal interests in property arising under the *Family Relations Act*, before marriage breakdown occurs.

In *Bregman v. Bregman*,⁷⁶ an Ontario case mentioned earlier, a painting was purchased by a husband's company in 1972 and displayed in the home. It was characterized as a family asset. The husband removed the painting in 1975, an act which was held to be an ineffective attempt to alter its status.

⁷⁴ *Stewart v. Stewart*, (1984) 56 B.C.L.R. 375 (B.C.C.A.). That position, however, would appear to be contradicted by other Court of Appeal authority. In *Murchie v. Murchie*, (1984) 39 R.F.L. (2d) 385 (B.C.C.A.), *e.g.*, it was said: In my opinion, it is proper to look to the totality of the assets and the equality of ownership given by s. 43. It is also proper to look at each individual asset and decide whether that asset should remain in equal ownership as tenants in common or whether that would be fair within the meaning of s. 51.

See also *Bateman v. Bateman*, (1984) 42 R.F.L. (2d) 120 (B.C.C.A.).

⁷⁵ *Gowanlock v. Gowanlock*, [1982] B.C.D. Civ. 1647-01 (S.C.); see also *Tratch*, *supra*, n. 3; *Martelli v. Martelli*, (1982) 33 B.C.L.R. 145, 26 R.F.L. 1 (C.A.); *Maruda v. Maruda*, (1984) 43 R.F.L. (2d) 26 (S.C.); *Underhill*, *supra*, n. 3; *Flather v. Flather*, [1984] B.C.D. Civ. 1640-05 (S.C.); *Burnham v. Burnham*, (1982) 28 R.F.L. (2d) 205 (B.C.C.A.). Where, however, the spouses keep their estates separate and jointly invest in business assets, the assets retain their character as business assets. If one spouse buys out the interest of the other spouse, the asset remains separate property: *Watson v. Watson*, (1984) 40 R.F.L. (2d) 305 (B.C.S.C.).

⁷⁶ *Supra*, n. 34; *querre*: could the husband have altered the painting's status as a family asset if he had removed it before marriage breakdown was imminent?

Because marriage breakdown was imminent, he was unable to alter its character as a family asset.

In *Groves v. Groves*,⁷⁷ both parties worked during a 32-year marriage. In issue was entitlement to insurance policies purchased by the husband. Counsel for the wife submitted that the policies were family assets because the funds to purchase them had come from a joint account. The court found that the funds in the joint account came from the husband alone and consequently were not family assets. Moreover, the insurance policies were not family assets because they concerned only the husband. This case suggests the kinds of problems that arise in characterizing the nature of assets for the purposes of the *Family Relations Act*. The funds earned by the husband were not initially family assets. Their subsequent use could have rendered them family assets. Under the *Family Relations Act*, funds in a joint account are family assets. The court, swayed by the source of the funds and their ultimate form, however, declined to characterize the insurance policies as family assets.

The general principle that a family asset cannot lose its identity apparently holds even when the parties separated before the Act came into force and sold assets thereafter; assets purchased with the proceeds of the sale of family assets have been held to be family assets under the Act.⁷⁸

In *Rigby v. Rigby*,⁷⁹ the husband and wife each owned a home prior to the marriage. After marrying, they lived in the wife's home for a few months and then moved to the husband's home. In 1976 the husband sold his home and purchased another. In 1977 the wife sold her home for \$30,000 net and retained the monies for her own use. It was held that the proceeds from the sale of the wife's home were family assets notwithstanding that the sale occurred before the *Family Relations Act* came into force and that the proceeds had never been used for a family purpose.⁸⁰

The court said:⁸¹

It is clear from a reading of the . . . Act that a non-owning spouse obtains an interest in family assets on the date of the first triggering event to occur after 31 March 1979. But what does the non-owning spouse have before that time? If nothing, then at any time before the triggering event, the owning spouse is free to dispose of family assets before the triggering event and acquire in their place assets that may not fit the definition of family assets. But if the non-owning spouse has some interest (characterized perhaps as a potential or conditional interest), then the proceeds of disposition in the hands of the non-owning spouse can be seen as held subject to that interest.

In *Bandiera v. Bandiera*,⁸² the home used by the family prior to the promulgation of the Act was in the husband's name. The spouses separated in 1978 and the wife signed a quit-claim deed during that year. The husband and his new wife resided in the home. The court held that the home continued to be a family asset, which was divisible between the spouses.⁸³

D. Summary

Under the *Family Relations Act* spouses are entitled to share family assets. The Act acknowledges two tests by which the courts may determine whether property is a family asset and divisible between the spouses. Property

⁷⁷ *Supra*, n. 3.

⁷⁸ *Fennings v. Fennings*, (1979) 17 B.C.L.R. 267, 12 R.F.L. (2d) 74 (S.C.); see *Gourlay v. Gourlay*, [1985] B.C.D. Civ. 1647-07 (B.C.S.C.) which involved business assets disposed of before a triggering event.

⁷⁹ (1981) 32 B.C.L.R. 384 (S.C.).

⁸⁰ See also *England v. England*, [1980] B.C.D. Civ. 1647-31 (S.C.).

⁸¹ *Supra*, n. 79, at 389.

⁸² (1979) 13 B.C.L.R. 327 (S.C.).

⁸³ See also *McLennan v. McLennan*, (1980) 20 B.C.L.R. 193, 17 R.F.L. (2d) 44 (S.C.); separation 1974.

used for a family purpose is a family asset. Property not used for a family purpose but to which the non-owning spouse has contributed is also a family asset. The *Family Relations Act* also lists specific kinds of property which are family assets whether or not they have been used for a family purpose or the non-owning spouse contributed to them.

Use for a family purpose has proved to be a difficult test to apply, and the nature of the inquiry is not always edifying. Doubt surrounds the significance of the following factors:

- (i) sole use by one spouse;
- (ii) the degree to which the asset made family life more pleasant;
- (iii) display in the home;
- (iv) intention to use an asset for a family purpose;
- (v) the degree of use necessary to constitute use for a family purpose.

The *Family Relations Act* provides that certain property, by its very nature, is to be shared by spouses, and adopts the test of use for a family purpose to determine what property falls into that category. The Act, however, leaves in doubt the reason for giving spouses shared rights in family assets. Do these rights follow as an incident of marriage or do they depend upon contribution or the presumed intention of the spouses? All of these possible justifications for granting shared rights in property used for a family purpose cause problems.

The test of use for a family purpose, at least in part, seems to rely on the spouses' intentions. The courts' use of intention has been inconsistent. Some courts hold that intention to use property for a family purpose is not sufficient reason to characterize property as a family asset. Other courts, presumably influenced by the former law, will rely on one or both spouses' intention that assets were family assets, even where the property was kept separate from family assets, a fact from which one might conclude that the owning spouse never intended it to be used for a family purpose. Some courts appear to believe that marriage itself reflects a mutual intention to share all assets. As a result, at least three separate approaches to determining divisible family property can be identified: i) the former law, which required a common intention to share family property in order to justify an actual or implied trust, ii) the approach adopted under the *Family Relations Act*, under which only property actually used for a family purpose is divisible; iii) full community of property, in which all assets, regardless of contribution or use, are shared by the spouses, since their decision to marry evidenced that intention.

Evidence of the spouses' intention may be unreliable and, in any event, the test of intention often leads to unfair results, as the former law proved. One spouse's intention is often determinative of the use to which property is put. Entitlement as an incident of marriage leads to wildly different results depending upon the amount of property brought into the marriage. Entitlement based upon contribution confuses the test of use for a family purpose with the test that directly acknowledges the significance of contribution. As will be seen in the next chapter, the significance of, and manner in which, contribution is to be taken into account is still unsettled. Problems posed by the uncertain philosophy underlying the determination of divisible property pervades the provisions of the *Family Relations Act* that determine shared rights in matrimonial property.

The test of use for a family purpose for determining whether property is divisible between the spouses has proved to be defective. The outcome of cases in which these issues are raised cannot be predicted. Results are inconsistent. The discretionary nature of the court's jurisdiction is enhanced,

but guidelines for the exercise of this jurisdiction have not emerged. Moreover, the test of use for a family purpose leaves open the opportunity for a spouse to retain separate property by forbidding family members to enjoy it. It is undesirable for the law to encourage people to deprive their families of the use of property or, as has happened, to force their families to live in penury while they amass a separate estate.⁸⁴

It would appear that the legislature intended to distinguish between family property and assets used to earn income. Different tests determine entitlement to these different categories of property. If it is desirable to continue to distinguish between business and family assets, a simpler means of distinguishing between these categories of property can be devised. For example, divisible family property could be defined as all property owned by the spouses except assets used to earn income or profit, to which the non-owning spouse has not contributed, and specific items of separate property. This approach has been adopted in Nova Scotia.⁸⁵

The test of use for a family purpose is philosophically obscure, and uncertain in application. It complicates the task before the courts and yet provides little certainty in determining whether property should be divisible. As Selbie L.J.S.C. observed:⁸⁶

On the question of family assets, I thank counsel for the cases cited. I find that the thread throughout is that there are no steadfast guidelines.

⁸⁴ *McDougall v. McDougall*, (1982) 29 R.F.L. (2d) 274 (B.C.S.C.); *Kropacek v. Kropacek*, (1982) 36 B.C.L.R. 296 (S.C.).

⁸⁵ *Matrimonial Property Act*, *supra*, n. 14, ss. 2, 4.

⁸⁶ *Houle v. Houle*, (1981) 28 B.C.L.R. 1, at 4 (S.C.).

A. Introduction

Under the *Family Relations Act*, business assets and ventures remain separate property, unless the spouse who does not own the property contributed directly or indirectly to them. The relevant sections read as follows:

45. (1) Subject to section 46, this section defines family assets for the purpose of this Act.

(3) . . . the definition of family asset includes

(c) . . . a right, share or interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own a property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) . . . an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

The manner in which the *Family Relations Act* deals with family assets, ventures and business assets is not entirely satisfactory. It does not, for example, accurately distinguish business assets from family assets. The test for a family asset is whether it is *ordinarily* used for a family purpose. It is a business asset if it is *primarily* used for a business purpose. Some assets will satisfy both tests. For example, a summer cottage may be ordinarily used by the family one month a year, and for the remaining 11 months be used to earn rental income. Section 45, which defines family assets, is subject to section 46, which defines business assets.¹ The summer cottage, consequently, should probably be characterized as a business asset, but there are examples where the courts have encountered similar problems of classification, and characterized the asset as a family asset.

Some assets may be neither business nor family assets. For example, one spouse might buy a condominium for the use of a parent. The condominium is not used for either a business or family purpose and is neither a business nor family asset.²

Sections 45 and 46 present another problem of interpretation. A venture becomes a family asset if the nonowning spouse contributes to it. A business asset becomes a family asset if the non-owning spouse contributes to its *acquisition or operation*. There is some doubt whether these tests differ in any significant respect in practice. There are also a number of unanswered questions concerning what constitutes direct or indirect contribution and how property is to be divided once contribution is established.

Lastly, it is not exactly clear how a venture differs from a business asset³. Some general answers have been given. For example, it has been held that the

¹ S. 45(1).

² See e.g., *Underhill v. Underhill*, (1983) 45 B.C.L.R. 244, 34 R.F.L. (2d) 419 (C.A.); *Noble v. Noble*, (1984) 50 B.C.L.R. 341 (S.C.), for discussions of assets which are neither business nor family assets; see also *Baker v. Baker*, [1984] B.C.D. Civ. 1645-11 (S.C.); *Fong v. Fong*, (1983) 45 B.C.L.R. 22, 34 R.F.L. (2d) 337 (C.A.); cf. *Gautier v. Gautier*, [1984] B.C.D. Civ. 1645-17 (S.C.): a home purchased by the husband for the use of his son and daughter-in-law was characterized as a family asset.

³ Rental property has been characterized as a venture: *Eng v. Eng*, [1984] B.C.D. Civ. 1645-18 (S.C.); *Paulovich v. Paulovich*, [1984] B.C.D. Civ. 1676-05 (S.C.); *Maracek v. Maracek*, [1984] B.C.D. Civ. 1643-01 (S.C.); in *Bawtinheimer v. Bawtinheimer*, (1984) 56 B.C.L.R. 25 (S.C.) and *Formosa v. Formosa*, (1983) 50 B.C.L.R. 81, 37 R.F.L. (2d) 217 (C.A.), real property was not characterized as a venture. In *Maracek*, *ibid*, and *Wagner v. Wagner*, (1982) 36 B.C.L.R. 68 (S.C.), no distinction was drawn between business assets and ventures. In *Cunningham v. Cunningham*, [1985] B.C.D. Civ. 1643-01 (S.C.), "business purposes" were defined as referring to continuing entrepreneurial enterprise, and that a venture was distinct from property used for a business purpose. A venture is a commercial speculation attended with some risk.

word "venture" implies self-employment and excludes all income made from any kind of employment.⁴ It also includes professional activities.⁵ It excludes activities which carry no risk.⁶

While helpful, these decisions do not clarify the intention of the legislature with respect to such assets as stocks and bonds, investments such as art, and income deposited in separate bank accounts.

B. Business Assets v. Family Assets

The *Family Relations Act* distinguishes between business assets and family assets. Generally, family assets are to be shared and business assets are to remain separate property. This reflects a policy decision that spouses should share certain types of property as of right. It was open to the legislature to make all property owned by spouses divisible between them, but in many cases that approach might be inappropriate. The legislature recognized, however, that a separate property regime for business assets might be equally unfair in some cases, and so adopted a special test to determine whether a non-owning spouse was entitled to a share in business assets.

That test is contribution. Where both spouses contribute money or money's worth to the acquisition or operation of an asset, they should both have interests in it. That was no less true under the former law.⁷

Acknowledging that contribution is a means of establishing divisible property still leaves open many issues. What kind of contribution is required? Frequently one spouse will not make a direct contribution to an investment or business asset. A spouse who is a homemaker, raises children, and looks after the family finances makes a recognizable contribution to the family and, in many cases, that contribution will indirectly benefit the other spouse's business interests. It may permit the income earner to pursue business interests free of domestic concerns. In any event, it constitutes a contribution to the well-being of the family.

The *Family Relations Act* recognizes the importance of indirect contributions, and provides that they entitle a non-owning spouse to an interest in business assets. Unfortunately, the *Family Relations Act* provides no guidance on how that interest is to be determined.

An approach which might avoid many problems currently experienced under the *Family Relations Act* would be to compensate a spouse for the value of direct or indirect contributions to a business.⁸ This approach would at least directly recognize that a non-owning spouse is entitled to compensation for benefits conferred on the owning spouse. The contribution would not, however, entitle the non-owning spouse to a share in capital. Instead, he would be fairly remunerated for his efforts.

Any approach that attempts to determine entitlement on a case by case basis will not, however, be problem free. The relationship of marriage represents a tangle of financial considerations. No single formula will provide a means to achieve perfect fairness when the financial interests of spouses are separated. How is the law to distinguish between generous and mean income

⁴ *Hickley v. Hickley*, [1982] B.D.C. Civ. 1645-03.

⁵ *Robertshaw v. Robertshaw* (No. 2), (1979) 17 B.C.L.R. 137, [1980] 2 W.W.R. 215 (S.C.).

⁶ *Richardson v. Richardson*, (1982) 32 R.F.L. (2d) 82 (B.C.S.C.).

⁷ *Pestkus v. Becker*, (1981) 19 R.F.L. (2d) 165 (S.C.C.).

⁸ A number of provinces provide that courts may adopt this approach: see, e.g., *The Matrimonial Property Act*, S.N.B. 1979, c. 32, s. 27; *Family Law Reform Act*, R.S.O. 1980, s. 152, s. 8; *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1, s. 9.

earners? Should different rules apply to a dependent spouse who is a master of economy and to one who has a taste for the fine things in life? The only approach which can accurately take these factors into account is to prepare a balance sheet of contributions and benefits conferred by spouses during the marriage. That approach is undesirable and probably unworkable.

Since contribution alone is a difficult measure of entitlement to apply, the *Family Relations Act* has adopted an uncomfortable compromise which relies only in part on the concept of contribution. The inclusive definition of indirect contributions affords most spouses with an interest in business assets. Once contribution is established, the Act obliges courts to treat the asset as a family asset. The portion of a family asset to which a spouse is entitled is not determined by reference to the spouse's contributions to it. It is determined by reference to the length of marriage, length of separation and other factors listed in s. 51. Suppose, for example, the courts find a non-owning spouse has made a minimal contribution to business assets. Many people would suppose that that would entitle the spouse to a minimal share of the business assets. The *Family Relations Act*, however, does not adopt that approach. The minimal contribution establishes that the business asset is a family asset, to be divided like other family assets. If the non-owning spouse is entitled to an equal share of family assets, he or she should also be entitled to an equal share of the business assets to which there has been contribution.

Since the *Family Relations Act* accepts that business assets are fundamentally different from family assets, it would probably have been appropriate to enact different rules to govern their division.⁹ In fact, most courts divide business assets with reference to the respective contributions of the spouses.

C. Contribution

1. DIRECT CONTRIBUTION

Where money or property of value is advanced by one spouse to the other for a business enterprise, there is little doubt that the advance constitutes a direct contribution. The courts have also recognized other kinds of direct contributions.

Employment of the non-owning spouse in the venture of the owning spouse constitutes a direct contribution even where the non-owning spouse worked and was paid as an ordinary employee of the venture, either during the marriage¹⁰ or prior to it.¹¹ In *Rushton v. Rushton*,¹² by way of contrast, it was held that investment advice did not constitute contribution.

Sharing risk by, for example, co-signing for a debt incurred by the other spouse's company also constitutes a direct contribution.¹³ Conversely, refusing to share in the risk inherent in borrowing money amounts to:¹⁴

... strong evidence that while prepared to share in the assets, she declined to assume any part of the risk involved in their acquisition. . . . [S]he cannot now assert that her contribution to the purchase . . . was in any way financial, save as to any direct contribution of salary to the parties' joint account, which she may have made, and this is uncertain.

⁹ See, e.g., *Bachman v. Bachman*, [1980] B.C.D. Civ. 1676-01 (S.C.).

¹⁰ *Robertshaw*, *supra*, n. 5; *McCleery v. McCleery*, (1983) 46 B.C.L.R. 120 (S.C.).

¹¹ See, e.g., *McIntosh v. McIntosh*, (1982) 38 B.C.L.R. 133 28 R.F.L. (2d) 337 (C.A.).

¹² (1984) 38 R.F.L. (2d) 308 (B.C.S.C.).

¹³ *Collins v. Collins*, [1982] B.C.D. Civ. 1640-08 (S.C.); *Uram v. Uram*, (1981) 34 B.C.L.R. 99; *var'd* (1983) 35 R.F.L. (2d) 82 (B.C.C.A.).

¹⁴ *McCreadie v. McCreadie*, (1982) 29 R.F.L. (2d) 188, at 192 (B.C.S.C.). It seems that the wife's failure to join in the guarantees affected the probity of other evidence of general direct contribution; cf. *Formosa v. Formosa*, [1982] B.C.D. Civ. 1647-05 (S.C.) *var'd*, *supra*, n. 3; *Uram*, *ibid.* Money loaned for investment which is repaid in net a contribution to the acquisition of the investment: *Gandham v. Gandham*, (1985) 46 R.F.L. (2d) 162 (B.C.S.C.).

It may not be necessary to establish a refusal to accept risk to negate direct contribution. In *Laxton v. Laxton*,¹⁵ the Court of Appeal declined to characterize a company owned by the husband as a family asset because the wife could not show that she had agreed to accept any risk. The difficulty presented by the dictum in *Laxton* is that, usually, the risks undertaken by one spouse affect both spouses until such time as a separation occurs. If, as many cases hold, specifically accepting risk justifies an interest in the business of the other spouse, should general acceptance of those risks be treated any differently?

2. INDIRECT CONTRIBUTION

(a) Generally

Not surprisingly, the concept of indirect contribution has been the subject of substantial litigation. Section 46(2) defines indirect contribution as including:

... savings through effective management of household or childrearing responsibilities by the spouse who holds no interest in the property.

This definition is susceptible to several different interpretations, and case authority is divided on its application. Moreover, the definition is not restrictive. The courts have been faced with determining the extent of indirect contributions beyond effective management of household or childrearing responsibilities.

(b) Effective Management of Household or Childrearing Responsibilities

The courts have adopted numerous approaches to determining whether homemaking services constitute indirect contributions sufficient to divide a business asset or venture as if it were a family asset. The cases do not lend themselves to neat analysis. Surprisingly sophisticated approaches have been adopted. For convenience, the cases are discussed in this section as falling generally into four broad categories indicating what facts the courts must find before the homemaker will be entitled to an interest in business assets:

- (i) if the homemaker was not completely ineffectual, or if the owning spouse cannot prove that the homemaker was ineffective, or if the wife was a good wife, then the homemaker will be entitled to an interest in business assets;^{15a}
- (ii) if the homemaker can prove general effectiveness in carrying out responsibilities, savings constituting an indirect contribution will be presumed;¹⁶
- (iii) if the homemaker can prove savings, it will be presumed that they assisted in the acquisition or operation of business assets;¹⁷
- (iv) the homemaker must establish that savings resulting from management of the home are connected in some way with the property in which an interest is sought;¹⁸

¹⁵ (1982) 41 B.C.L.R. 194, 31 R.F.L. (2d) 337 (C.A.).

^{15a} *Leung v. Leung*, [1983] B.C.D. Civ. 1640-02 (B.C.S.C.); *Gwynn v. Forsythe*, (1983) 40 B.C.L.R. 358 var'd (1985) 45 R.F.L. (2d) 86 (B.C.C.A.); *Nottingham v. Nottingham*, [1980] B.C.D. Civ. 1643-01.

¹⁶ *Trach v. Trach*, (1981) 30 B.C.L.R. 98 (S.C.); *Wagner v. Wagner*, (1982) 36 B.C.L.R. 68 (S.C.); *Elcom v. Elcom*, (1982) 35 B.C.L.R. 293 (S.C.); *off'd* (1983) 49 B.C.L.R. 297 (C.A.); *Simpkins v. Simpkins*, (1981) 30 B.C.L.R. 340, [1981] 5 W.W.R. 598, var'd (1982) 41 B.C.L.R. 75, [1983] 2 W.W.R. 361 (C.A.); *McDougall v. McDougall*, (1982) 39 B.C.L.R. 88, 29 R.F.L. (2d) 274 (S.C.); *Nottingham v. Nottingham*, [1980] B.C.D. Civ. 1643-01 (S.C.); *Leung v. Leung*, [1983] B.C.D. Civ. 1640-02 (S.C.); *Sonnenschild v. Sonnenschild*, [1982] B.C.D. Civ. 1640-07 (S.C.); *Stewart v. Stewart*, (1984) 56 B.C.L.R. 375 (C.A.); *Underhill*, *supra*, n. 2.

¹⁷ *Loche v. Loche*, (1983) 36 R.F.L. (2d) 216 (B.C.S.C.); *Underhill*, *supra*, n. 2.

¹⁸ *Sammels v. Sammels*, (1981) 30 B.C.L.R. 186, 22 R.F.L. (2d) 402 (S.C.); *Shu-Jung (Quan) v. Dick (Quan)*, (1981) 38 B.C.L.R. 68 (S.C.); *Gwynn v. Forsythe*, *supra*, n. 15a; *Johnson v. Johnson*, (1981) 30 B.C.L.R. 115, 24 R.F.L. (2d) 70 (S.C.).

- (v) the homemaker must establish that savings have a connection with the property, and that the contribution was significant.¹⁹

Sections 45 and 46 are open to any of these interpretations. Courts which require evidence connecting household savings with acquisition or operation of a business asset look to section 46(1) which appears to require some sort of causal link between contribution and the business asset. Courts which accept a presumption of a causal link look to section 46(2) and the definition of "indirect contribution." The division of opinion rests on whether the definition in section 46(2) is confined to indirect contributions generally, which may or may not make business assets family assets, or whether it defines one kind of indirect contribution which automatically gives the dependent spouse an interest in business assets.

Most courts accept that proof of effective management of the home generally gives rise to a *prima facie* right to 50% of the business asset, subject to a section 51 redistribution. In *Elsom v. Elsom*,²⁰ for example, the Court of Appeal stated that proof by a non-owning spouse that he or she was responsible for, or involved in, the household management or child rearing responsibilities of the family raises a *prima facie* case pursuant to section 46(2). The spouse who owns the assets can overturn *prima facie* entitlement by proving either that the indirect contributions of the non-owning spouse were valueless, or that no savings resulted from them.²¹ The *Elsom* decision echoes the earlier decision in *Simpkins v. Simpkins*,²² where it was held that after a 13 year marriage, it can be inferred not only that the wife's duties had been performed effectively, but also in a manner which produced savings to the business asset. In *Simpkins*, however, the asset in issue was purchased shortly before the separation and the Court of Appeal ruled that the wife, consequently, could not have made any substantial contribution to it.²³

The weight of authority suggests that a spouse who is an effective homemaker will usually be entitled to a share in business assets without proof of more. That the courts have not adopted a consistent approach, however, is as much due to ambiguities in the legislation as to perceptions of individual judges of the unfairness which may follow from any theory, depending on the circumstances.

(c) Inherited Property

The *Family Relations Act* provides no guidance on how business assets inherited by one spouse are to be divided on marital breakdown. In this context, contribution means little. A non-owning spouse's contributions will usually have had little consequence with respect to receipt of the inheritance. Interpreting section 46(2) as giving the non-owning spouse an interest in inherited property merely on proof of effective household management will be perceived by many to be unfair. When the courts are confronted with this problem, not surprisingly, they tend to adopt a more conservative view of the effect of section 46(2).

¹⁹ *Tahacs v. Tahacs*, [1982] B.C.D. Civ. 1640-01 (S.C.); *Blockberger v. Blockberger*, (1981) 30 B.C.L.R. 78, 23 R.F.L. (2d) 177, *var'd* (1983) 48 B.C.L.R. 235, 36 R.F.L. (2d) 241 (C.A.); see also *Young v. Young*, (1981) 21 R.F.L. (2d) 388 (Ont. C.A.).

²⁰ *Supra*, n. 16.

²¹ The Court of Appeal said that if the evidence presented by the owning spouse is not sufficient to overcome the presumption arising from the operation of section 46(2) the facts proved by the owning spouse may still have a direct bearing on a redistribution pursuant to section 51; see also *Collins v. Collins*, [1982] B.C.D. Civ. 1640-08 (S.C.); *Underhill*, *supra*, n. 2.

²² *Supra*, n. 16.

²³ *Ibid*.

In *Samuels v. Samuels*,²⁴ for example, the parties married in 1957 and separated in 1979. The trial was held in 1981. At issue were certain properties in Saskatchewan which had been inherited by the husband and which had been managed by the brother of the husband throughout the marriage:²⁵

What I think the wife must prove is that her contribution had some connection, albeit in only a general way, with the property in which she seeks an interest. That some connection is required is clear from section 46(1) which excludes business assets where the non-owning spouse makes no contribution to "the acquisition of the property" or "operation of the business". . . . This seems also the sense of section 45(3)(e) which constitutes as a family asset a spouse's interest in a venture "to which money or money's worth" was contributed by the other spouse. . . .

To find [the properties in Saskatchewan to be] a family asset it would, I think, be necessary to hold that the business or venture assets are family assets whenever a non-owning wife shows simply that she has been a good wife and mother, without any need to prove a link between the activities of the wife and the asset in question. I do not construe ss. 45(3)(d) and ss. 46 in that way. (Emphasis in original.)

In *Blockberger v. Blockberger*,²⁶ the trial judge was prepared to divide the family home, which was purchased from income earned from inherited business assets, equally between the spouses, but was not prepared to divide the business assets.

In *Shu-Jung (Quan) v. Dick (Quan)*,²⁷ properties inherited by the husband were held not to be family assets:

[E]verything that Mrs. Quan did made not one particle of difference to the proportion of shares of [the company] . . . that [the husband] . . . received nor to the value of those shares. . . . [N]othing Mrs. Quan did enabled her husband to undertake any initiatives that resulted in any enhancement in value of the shares.

The striking feature in *Shu-Jung (Quan)* is that the marriage subsisted for 21 years and the business assets had been owned by the husband at the time of the marriage. In *Hickley v. Hickley*,²⁸ on the other hand, part of the husband's inheritance was used for a family purpose. The court held that all of the inheritance was a family asset because the parties had intended to use the whole inheritance for family purposes. In *Schoenfeld v. Schoenfeld*,²⁹ the husband carefully kept inherited property separate from family property. Nevertheless, the court held that there was an intention to share the property.

(d) *Separate Property*

The *Family Relations Act* does not directly recognize the concept of separate property after marriage breakdown. During many marriages, however, the spouses conduct their financial affairs separately, and there is a clear division between the ownership of their assets.

Where the spouses have conducted their financial affairs separately, each retaining income earned and property owned, seldom will one spouse indirectly contribute to business assets owned by the other spouse. In *Underhill v. Underhill*,³⁰ for example, the Court of Appeal had to consider a 26 year marriage. For the first 14 years, the wife managed the home. Later she worked as a teacher and housekeepers were engaged in the home. The wife retained her own earnings and refused to share in the household expenses, including the cost of housekeepers. It was held that she had no interest in any business asset purchased after 1969, the year she started working.

²⁴ *Supra*, n. 18.

²⁵ *Ibid.*, at 188.

²⁶ *Supra*, n. 19. On appeal, the wife received 10% of the business assets: (1983) 48 B.C.L.R. 235 (B.C.C.A.).

²⁷ *Supra*, n. 18, at 79-80.

²⁸ *Supra*, n. 18.

²⁹ [1984] B.C.D. Civ. 1650-01 (S.C.).

³⁰ *Supra*, n. 2.

In *Raines v. Raines*,³¹ neither the business nor the home were characterized as family assets because the parties, by their conduct, negated both contribution to each other's estates and intention to share.³²

(e) *Negative Contributions*

In some cases the dependent spouse's conduct will have interfered with the operation of a business and contributed to a decrease in its value. If a positive contribution is sufficient reason to award a dependent spouse an interest in business assets, negative contributions, it might logically seem, should reduce or extinguish the entitlement of the dependent spouse to any interest.

In *Leung v. Leung*,³³ for example, the wife's conduct was in fact detrimental to the business during the last five years of a 21 year marriage. She was held entitled to only 12% of the business assets. In *Walters v. Walters*,³⁴ on the other hand, the court apparently accepted the evidence that the wife hindered the business, but divided the asset equally on the ground that the legislature did not intend the court to consider the extent to which a spouse supported the business.

(f) *Inadequate Contributions*

Many courts accept that effective household management constitutes an indirect contribution, without proof of savings effected or a connection between savings and the business asset. In *Vance v. Vance*,³⁵ for example, it was held that a wife need only prove general effectiveness to become entitled to business assets, and in *Leung v. Leung*,³⁶ that a non-owning spouse is entitled to a share of the business assets unless she was "completely ineffectual during the marriage." In order to measure effective household management, some courts have attempted to adopt an objective standard. In *Gwynn v. Forsythe*,³⁷ for example, it was said that effectiveness is to be measured in the light of ordinary standards of the community. There will be circumstances, however, where the homemaker may perform the role of household management or childrearing to the best of his or her ability and still not meet the ordinary standards of the community.

In *Nottingham v. Nottingham*,³⁸ the parties married in 1968 and separated in 1977. The wife developed a serious kidney disorder shortly after the marriage. By any objective measure, the wife did not carry out her household responsibilities in accordance with the norm, because she was physically incapable of doing so. It was held that, notwithstanding her handicap, she had been a good wife "and should be regarded as having contributed to the acquisition" of certain lands purchased during the marriage. The motive behind the judgment is laudable, but the decision itself ignores the words of the statute and the bulk of existing case law.³⁹

³¹ [1903] B.C.D. Civ. 1623-01 (S.C.).

³² In *Formosa*, *supra*, n. 3, the parents of the husband purchased land and resold it to the parties on favourable terms. The intention of the parties had been to construct a summer cottage on the land, but the cottage was never built. The wife had made no contributions to the purchase or maintenance of the land. The trial judge held that the land was a family asset. The Court of Appeal held that the land would have qualified as a family asset if the intentions of the parties had been carried out. Since the land had not been ordinarily used for a family purpose during cohabitation, it was not a family asset. Cases such as *Raines*, *supra*, n. 31, and *Tsakas*, *supra*, n. 19 cannot be reconciled with *Formosa*.

³³ *Supra*, n. 16. See also *Johnstone v. Johnstone*, (1981) 26 R.F.L. (2d) 18 (B.C.S.C.).

³⁴ [1981] B.C.D. Civ. 1682-01 (S.C.). See also *Halani v. Halani*, [1985] B.C.D. Civ. 1640-02 (S.C.), where evidence of conduct adversely affecting the value of the business was held to be irrelevant.

³⁵ 31 B.C.L.R. 216, 23 R.F.L. (2d) 397 (S.C.).

³⁶ *Supra*, n. 18.

³⁷ *Supra*, n. 15a.

³⁸ *Supra*, n. 16.

³⁹ The same result could have been achieved by awarding maintenance, either on a periodic or a lump sum basis; in *Tsonis v. Tsonis*, [1985] 45 R.F.L. (2d) 353 (B.C.S.C.), it was held that the only issue was whether contributions had been made. The court may not take into account reasons for a failure to contribute.

The approach adopted in *Nottingham*, however, has also been followed in other cases. In *Johnstone v. Johnstone*,⁴⁰ for example, it was observed that:

An indirect contribution can, I think, come in other forms than just through "savings by effective management of household or child rearing"! Certainly, if . . . [the non-owning husband] had been supportive of his wife — by being available, by showing love and affection, by being faithful, by being a good listener, by being reliable, by being a good parent, by being interested in her work, by caring and by being honest — consideration might be given to converting some of the business assets to family assets.

These considerations may be of considerable importance when a dependent spouse is physically unable to meet an objective standard regarding effective household management.

In general, courts take into account a spouse's disability when determining contribution. Where disability is caused by the spouse's conduct, it will not mitigate failed contribution. In *Cunningham v. Cunningham*,⁴¹ the wife was an alcoholic. The court observed that, although alcoholism is commonly viewed as a disease, it has a strong voluntary element. Alcoholism was not reasonable excuse for failing to contribute to a reasonable standard. Consequently, the wife was unable to establish indirect contributions to the acquisition of business assets. Alcoholism, however, limited the wife's capacity to be self-supporting. That factor justified awarding the wife a larger share of family assets.

(g) *Onus of Proof*

Courts which require proof of savings from household management and a connection between savings and the acquisition or operation of business assets, place the onus of proving "effective management" upon the non-owning spouse. The non-owning spouse (typically the wife) must satisfy the court that her stewardship of the household funds was prudent and resulted in business assets being accumulated.⁴²

In contrast, those courts prepared to presume that savings result from effective management require the owning spouse to disprove savings. Some courts have gone further. In *Gwynn v. Forsythe*,⁴³ it was held that:

[A] trial judge should ask and answer the following questions [in respect of s. 46(2)]. . . (a) Has the spouse who is claiming conversion established that she has performed the role of household management or child rearing to the best of her ability? (b) Was that role performed effectively in the light of ordinary standards in the community? . . . [T]he onus here is on the defending spouse, and if the first two questions are answered in the affirmative s. 46(2) presumes savings of either money or time and effort or both.

The result of reversing the onus of proof on the issue of household management is that it renders defence to a claim by the non-owning spouse more difficult. It also reduces the issue of contribution to an investigation of how well the non-owning spouse behaved during the marriage.

(h) *Other Kinds of Indirect Contribution*

Section 46(2) leaves open the possibility of other kinds of indirect contributions apart from effective household management. In *Johnstone v. Johnstone*,⁴⁴ mentioned earlier, it was said that a spouse who is supportive and loyal indirectly contributes to the other spouse's business interests. It is

⁴⁰ (1981) 33 B.C.L.R. 368, at 379, 26 R.F.L. (2d) 18, at 30 (S.C.).

⁴¹ (1985) 45 R.F.L. (2d) 395 (B.C.S.C.); see also *Tsonis v. Tsonis*, *supra*, n. 39.

⁴² *Johnson*, *supra*, n. 18.

⁴³ *Supra*, n. 18, at 205-06; see also *Mercier v. Mercier*, [1985] B.C.D. Civ. 1534-02 (B.C.S.C.).

⁴⁴ *Supra*, n. 40.

difficult to envision other kinds of indirect contribution. There are several examples, however, of factors which do not constitute indirect contribution.

Agreeing to an abortion, and thus freeing the husband to spend more time in the business is not an indirect contribution within the meaning of section 46(2).⁴⁵ Where the wife's father loans money to the husband to start a business, the fact that the wife made the source of the loan available has no significance.⁴⁶ The cases are divided on whether providing income to meet day-to-day expenses and not for business or investment is an indirect contribution.⁴⁷

In *Deanne v. Cunningham*,⁴⁸ the wife gave up a well paying job and moved to British Columbia for the marriage. These were characterized as indirect contributions. They would also evidence detrimental reliance, which would be significant in a contractual or restitutionary context. The *Family Relations Act*, however, does not support that approach to dividing family property.⁴⁹

(i) Theory

Many problems have been posed by the need to characterize "indirect contribution." The view that effective household management in itself constitutes indirect contribution relies on the theory that savings automatically result from it.

In the decision at trial in *Blockberger v. Blockberger*,⁵⁰ the strict interpretation of section 46(2) that requires proof of savings and a link between savings and business assets, appears in the clearest form:⁵¹

Did Mrs. Blockberger make a contribution, direct or indirect, to the acquisition by Blockberger of his shares in the two companies? Certainly she made no direct contribution. . . . As to indirect contribution, Mrs. Blockberger supplied . . . 'effective management of household or child rearing responsibilities'. But was this an indirect contribution to his acquisition of the shares? I think not. It would have made not the slightest difference to his acquisition of the shares if she had been a domestic slattern, a shrew, a neglectful mother, and an alcoholic to boot, instead of the model wife and mother she in fact was. I find that she made no direct or indirect contribution to his acquisition of his shares.

The next question is whether Mrs. Blockberger made a direct or indirect contribution to the operation of the business. She made no direct contribution to its operation. She devoted herself exclusively to her home duties and outside activities. No claim of extensive entertainment of customers or staff of Broadway Printers was put forward. . . . To try to translate her miniscule activities as to the business into a definitive direct contribution to the operation of it would be a distortion of common sense.

There remains to be considered whether or not her role, adequately and well carried out, of effective management of household and child rearing responsibilities, constitutes an indirect contribution to the operation of the business. The trend of British Columbia decisions seems to be towards the principle that when the wife carries out adequately wifely and motherly duties, she frees the husband to advance his fortunes in the business world, and that therefore to the extent that his fortunes are advanced, she is entitled *prima facie* to one-half of the advance,

⁴⁵ *McCleery*, *supra*, n. 11: being a confidante, agreeing to be named as owner or director of a company, spending time with staff and signing cheques on behalf of the company, however, were characterized as indirect contributions.

⁴⁶ *Calfo v. Calfo*, [1981] B.C.D. Civ. 1640-01 (S.C.).

⁴⁷ *Girard v. Girard*, (1983) 42 B.C.L.R. 305 (C.A.); *Jones v. Jones*, [1982] B.C.D. Civ. 1640-09 (S.C.); *Paulovich*, *supra*, n. 3; *Chau v. Tsang*, (1982) 27 R.F.L. (2d) 187 (B.C.S.C.), where the wife's income was considered to be a contribution because it freed the husband's income for use in the business; *Johnson v. Johnson*, [1984] B.C.D. Civ. 1623-03 (S.C.).

⁴⁸ [1985] B.C.D. Civ. 1654-01 (S.C.).

⁴⁹ This kind of analysis, however, is not unusual. In *Murchie v. Murchie*, (1984) 53 B.C.L.R. 157, 39 R.F.L. 385 (C.A.) it was said that the spouses married in contemplation of each other's assets, and by entering marriage gave up opportunities. These were relevant considerations in determining the fairness of a division of family property.

⁵⁰ *Supra*, n. 19.

⁵¹ *Ibid.*, at 185-187. This is included as an example of one line of reasoning under the Act. The decision was reversed on appeal.

because her indirect contribution has taken the asset out of the exception defined in section 46(1), and brought it within the definition of family asset in s. 45(3)(e): "a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse". The first flaw in the above proposition is that it assumes that the husband would be carrying out "effective management of household or child rearing responsibilities" if his wife did not do so. I see no justification for that assumption. To assume that such would occur is to be blind to the ordinary and expected conduct of the Western Canadian husband.

The second and larger flaw in the proposition is the assumption that "effective management of household or child rearing responsibilities" by a wife invariably must make an indirect contribution to the acquisition or operation of the husband's business (see s. 46(1)) or invariably must constitute an indirect contribution to the husband's 'right, share or interest. . . in a venture. . . ' (see s. 45(3)(e)). The Act does not say or connote that. All it connotes is that "effective management of household or child rearing responsibilities" may, can, not must, constitute an indirect contribution. There must be some connection between the wife's conduct and the asset in question. If merely supplying "effective management of household or child rearing responsibilities" *per se* constituted an indirect contribution to a husband's business, or his right, share, or interest in a venture, then the statute would say simply that. The complexity of s. 45(3)(e) and of s. 46(1) would be unnecessary. I can think of many instances where wifely and motherly duties would make an indirect contribution to the operation of a business, but the instance of the *Blockbergers* is not one. I hold that his shareholdings. . . are not family assets within the meaning of the Act.

*Tratch v. Tratch*⁵² and other cases have held that the savings to the husband should be presumed because, without the help of the wife, he would have had to ensure that the duties were carried out by someone else. The comparison of a wife's duties to that of a paid cook or housekeeper, however, is not particularly helpful. If the policy is that both spouses share mutual obligations, including financial support and homemaking services it follows that both spouses should share in the fortunes of the family, including assets of either spouse. It is not particularly significant how the spouses decide to fulfill these mutual obligations. This position is based on a particular view of marriage and what that relationship entails.⁵³

The difficulty with the reasoning in *Blockberger* is that the approach suggested cannot work in reality. Even an exemplary housewife with 25 years of household management and child rearing behind her is not likely to be able to prove any nexus between her activities and the fortunes of the business assets managed by the husband. This approach appears to deprive of any force the inclusion of effective management of the domestic household as an indirect contribution.

The confusion in the cases flows directly from the concept of contribution. "Direct contribution" presents few problems. "Indirect contribution" presents many problems because it obscures the underlying philosophy of the *Family Relations Act*.

Problems that arise in determining entitlement to business assets are due almost entirely to the failure of the *Family Relations Act* to define the basis for shared property rights. Courts which adopt a narrow view of what kinds of indirect contributions will justify a share in business assets hold that entitlement is based on indirect contributions of value. Courts which take a broad view of the kinds of indirect contributions that will justify a share in business assets look upon entitlement as more or less an incident of marriage.

The undefined nature of entitlement following from indirect contributions was probably designed to allow the courts to distinguish between the

⁵² *Supra*, n. 16.

⁵³ See, e.g., *Margolese v. Margolese*, (1981) 30 B.C.L.R. 381, 24 R.F.L. (2d) 176 (C.A.).

circumstances which may arise in different marriages: the marriage of short duration, the marriage between a person of wealth and one who is impoverished, windfalls to one spouse to the exclusion of the other. A hard and fast rule would not deal adequately with the variety of factors which may arise.

The legislature may have intended courts to adopt the following approach: courts must take into account direct contributions to business assets, dividing property according to traditional principles of property law. Spouses in a lengthy marriage are entitled to share in business assets notwithstanding contribution. If the marriage is of short duration, or the property in question was the result of a windfall, the non-owning spouse should not be able to look to business assets to which he or she has not directly contributed. The value of these assets should be taken into account when ordering maintenance.

It is, however, impossible to say what course the legislature intended the courts to adopt, and case law under the *Family Relations Act* demonstrates that judges have a generous discretion to divide business assets according to their individual beliefs concerning marriage.

D. Intangible Assets

1. PROPERTY AND PERSONAL RIGHTS

When most people think of property, they think of a tangible asset which can be exchanged for value, like land or a bicycle. Some kinds of assets, such as rights, permissions or qualifications, are intangible. There are many examples of intangible assets: patents and copyrights; debt; educational, business and professional training; degrees, certificates and licenses.

Some kinds of intangible assets are property and they can be exchanged for value. Patents and copyrights are examples of intangible property.⁵⁴ Other kinds of intangible assets are really no more than personal rights, although some of these are transferable and resemble property. A licence to operate a taxi or a license to sell liquor are examples of transferable personal rights.

For the most part, the courts have little difficulty in dividing intangible assets.

Some kinds of personal rights, however, are incapable of being transferred and for that reason, impossible to apportion between the spouses. Education and professional qualifications, for example, are neither property nor transferrable personal rights.⁵⁵ Another example would be business experience. These qualifications have no value in themselves. These kinds of intangible assets are often used, however, to earn income. They are often referred to as "career assets."⁵⁶

2. CAREER ASSETS

Frequently, one spouse will support or make other direct or indirect contributions to the other spouse while he or she acquires experience, education or professional qualifications.⁵⁷ However, since a career asset is not

⁵⁴ See, e.g., *Coulthard v. Coulthard*, (1984) 38 R.F.L. (2d) 78 (B.C.S.C.) where patent rights were held to be property for the purposes of the *Family Relations Act*.

⁵⁵ One early case under the *Family Relations Act* suggested that a degree should be characterized as a family asset: *Wolverton v. Wolverton*, (1980) 24 B.C.L.R. 33 (S.C.). American case law has been influential in the position adopted subsequently: see e.g., *Thew v. Thew*, (1982) 45 B.C.L.R. 399 (S.C.); *Whitehead v. Burrell*, (1983) 47 B.C.L.R. 211, 35 R.F.L. (2d) 440 (S.C.); see also *Jarvis v. Jarvis*, (1982) 32 R.F.L. (2d) 144 (B.C.S.C.); *McIntosh v. McIntosh*, [1984] B.C.D. Civ. 1647-10 (S.C.), 6 Nov. 1984, Vancouver, A 840054, unreported (B.C.S.C.); *Jirik v. Jirik*, (1984) 37 R.F.L. (2d) 385, (B.C.S.C.), additional reasons (1984) 40 R.F.L. (2d) 79 (B.C.S.C.); *Barley v. Barley*, (1984) 43 R.F.L. (2d) 100 (B.C.S.C.).

⁵⁶ See, e.g., *McIntosh*, *ibid*; *Barley v. Barley*, *ibid*.

⁵⁷ *Supra*, n. 55.

property, it is neither a business asset nor a family asset within the meaning of the *Family Relations Act*, and is not susceptible to division:⁵⁸

Certainly a university degree is an asset in one sense of the word but it is not tangible property capable of either valuation or distribution. It is personal to the holder — in the hands of one person it may be a key to riches, in the hands of another it may be virtually worthless. The matter was well stated by Lee J. in a decision of the Supreme Court of Colorado, *Re Marriage of Graham*, Colo. 574 P. (2d) 75 at 77.

"An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of 'property'. It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."

The practicing certificate is in the same category as the degrees — it is not property in the usual sense of that term. The same applies to any enhanced earning capacity that the husband may have acquired by reason of his degrees and certificate — it just cannot be categorized as property.

It is not in dispute that the acquisition of the degrees and the enhanced earning capacity of the husband, due in part to the efforts of the wife, are matters that can be taken into account on the question of maintenance and on an apportionment of family assets. Unfortunately, in this case there are no family assets and the husband has not, as yet, started to reap any substantial financial benefits from his education.

3. PROFESSIONAL PRACTICES

A spouse may use his "career assets" to operate a business. While a career asset can not be family property, the business itself may be if the non-owning spouse has contributed directly or indirectly to its acquisition or operation.⁵⁹

A professional practice is one kind of business in which income is earned through the use of a career asset. The issue of whether a professional practice is a family asset has generally followed the reasoning applied to the determination of whether a non-professional business is a family asset. The courts look to s. 45(3)(e) and s. 46(2) in determining whether the non-owning spouse made direct or indirect contributions to the professional practice.⁶⁰ Law practices, however, were a notable exception.

In *Piters v. Piters*⁶¹ the court held that the *Legal Profession Act* (now *Barristers and Solicitors Act*) precluded ownership in a law practice by a non-professional spouse. The rationale provided by the court was that declaring the law practice a family asset would allow the non-professional spouse access to confidential communications and a voice in the policy making of the practice, without being subject to the professional sanctions imposed upon the professional. This case was subsequently followed with reluctance in *Ladner v. Ladner*.⁶² An attempt to extend the principle to a medical practice, however, was unsuccessful.⁶³ The Court of Appeal in *Underhill v. Underhill*⁶⁴ removed this inconsistency, declaring that *Piters* was wrongly decided and expressly

⁵⁸ *Whitehead*, *supra*, n. 55, at 446-7.

⁵⁹ *Supra*, n. 55; *Vance v. Vance*, (1981) 23 R.F.L. (2d) 397 (B.C.S.C.).

⁶⁰ *See, e.g., Robertson v. Robertson*, (1979) 17 B.C.L.R. 137, (1980) 2 W.W.R. 215 (S.C.); *Jacobs v. Jacobs*, [1981] 1 W.W.R. 481, 22 R.F.L. (2d) 455 (B.C.S.C.); *Barley*, *supra*, n. 55.

⁶¹ (1980) 20 B.C.L.R. 393, 19 R.F.L. (2d) 217 (S.C.).

⁶² (1980) 116 D.L.R. (3d) 66, 20 R.F.L. (2d) 243 (B.C.S.C.).

⁶³ *Jacobs*, *supra*, n. 60.

⁶⁴ *Supra*, n. 2.

overruling *Piters and Ladner*. It was held that the wife was not seeking the right to practice a profession in which her husband is qualified to practice, but rather she was seeking a sum representing her interest in that asset.

As a result of *Underhill* it seems unlikely that any professional practice will be excluded from characterization as a family asset on the grounds of a regulatory statute conflicting with the *Family Relations Act*.

4. VALUATION

It is often difficult to value businesses, such as professional practices, which rely upon the use of a career asset. Generally, these kinds of businesses consist of premises, office furniture and other tangible assets. These have some value, but do not reflect the true value of the business as a going concern. Its profitability depends upon use of a career asset. Its value depends upon the approach to valuation that is adopted.

There are several approaches that might be taken to valuation. The business might be valued assuming the spouse will continue to operate it (the "discounted cash flow" approach). This approach has been rejected in at least three British Columbia cases.⁶⁵ Alternatively, the business might be valued assuming a notional sale of it.⁶⁶ Two methods might be used to place a fair market value on a professional practice based on a notional sale. The "excess earnings" approach places a capital value on the profit that would be earned if the business were operated by an employee.⁶⁷ The "actual market place" approach places a value on the tangible assets of a business and its "good will."⁶⁸ "Good will," in this context, is a measure of the number of clients or patients who are likely to stay with the purchaser of the business or professional practice.

The *Family Relations Act* and cases decided under it provide little guidance on what methods should be used to value a business or professional practice. The Court of Appeal has confirmed that there is no guiding rule on valuation:⁶⁹

A valuation, for example, based on discounting the future earnings of Dr. Murchie is not an appropriate way to value a professional practice as an asset for the purposes of the *Family Relations Act*. I do not consider it is necessarily wrong to consider the value of the good will to Dr. Murchie, as well as to consider the value of the good will to an anonymous, hypothetical purchaser. There is no rule that makes any particular formula the only suitable formula in any particular case. In my opinion the trial judge did not err in principle in valuing the dental practice in the way that he did or in reaching the conclusion that he did as to the valuation of the practice.

Valuing a business or professional practice on the basis of a notional sale will often result in a conclusion that the practice has no value apart from its tangible assets.

In *Johnson v. Johnson*,⁷⁰ the practice of an ophthalmologist was held to have no market value. Ophthalmologists are in great demand and their practices have no resale value.

In *Barley v. Barley*,⁷¹ the practice of an anaesthetist was located in a hospital. There were no tangible or intangible assets which could be valued.

⁶⁵ *Jackh*, *supra*, n. 60; *Johnson v. Johnson*, (1982) 27 R.F.L. (2d) 10 (B.C.S.C.); *Murchie v. Murchie*, [1983] B.C.D. Civ. 1645-11 (S.C.), 22 Oct. 1982, Vancouver, C 815292, unreported (B.C.S.C.), where it was said that this approach was inappropriate in the case of a relatively short marriage where the professional practice was developed before marriage; *cf. d. supra*, n. 49.

⁶⁶ In *Jackh*, *ibid.*, it was concluded that the professional practice should be valued at its fair market value, by analogy to the practice adopted in valuing other family assets.

⁶⁷ *See, e.g., Murchie*, (S.C.), *supra*, n. 65.

⁶⁸ *Ibid.*

⁶⁹ *Supra*, n. 49, at 389-90.

⁷⁰ *Supra*, n. 65; *McIntosh v. McIntosh*, (1985) 46 R.F.L. (2d) 249 (B.C.S.C.).

⁷¹ *Supra*, n. 55.

The practice was characterized as an appointment, which was not transferable and therefore had no fair market value. *Johnson* was cited in finding there were no grounds for departing from the traditional approach to such a valuation. The problem faced by the court was summarized as follows:⁷²

If expected earnings were to be the basis of valuing Dr. Barley's practice, there is no logical reason why such basis should not be used to value the "venture" or "business" interest of all professionals when there are no tangible assets to value. From there it would seem to be a short step to say that expected earnings are per se a family asset and that all spouses who earn income must account to the other spouse in respect of them. [Counsel]. . . indeed submits that at the heart of Dr. Barley's "venture" asset is his income earning ability and admits that if Dr. Barley is engaged in a "venture" for which he is accountable under Pt. 3 so are all income earners, including employees, whose future earnings can be estimated. That is a radical view of Pt. 3. I do not believe the *Family Relations Act* was intended to give one spouse, on the principle of sharing family assets, an equal interest in the future earnings of the other.

5. THE NON-OWNING SPOUSE'S INTEREST

It has been argued, without success, that the non-owning spouse should be permitted an ongoing interest in the professional practice, similar to holding shares in a company. The courts have consistently rejected this proposition. Where the non-owning spouse has been granted an interest in a professional practice, the courts have made an award under S.52(2)(c) ordering monetary compensation in the amount of the interest.⁷³ The perspective of the courts is illustrated in *Jackh* where Esson J. observed:⁷⁴

Such a [professional] practice differs in kind from most other assets. That difference arises from the fact that the value of the asset, apart from the relatively minor matter of working capital and fixed assets, lies in the future earning ability of the spouse whose practice it is. Were Mrs. Jackh to be granted an interest in the practice, she would have essentially an interest in the future earnings of Dr. Jackh. . . . [A] professional practice. . . is very much closer in its nature to a salaried position than it is to assets such as ownership of a corporate enterprise. The spouse of professional persons, by getting an interest in the practice, receive a benefit which the legislation does not give to the spouses of salaried persons.

6. REAPPORTIONMENT OF OTHER FAMILY ASSETS

A related issue which is not yet settled is whether the acquisition of degrees and similar intangible assets during marriage is a factor which may be considered in reapportionment of property under s. 51.

In *Thew v. Thew*⁷⁵ it was stated in *obiter dicta* that these intangible assets were factors to be considered under s. 51 (e) and (f).

In contrast is *McIntosh v. McIntosh* where Catliff L.J.S.C. stated:⁷⁶

I do not regard *Thew* as authority for the proposition that one spouse may obtain a greater share of family assets because he or she has helped the other spouse obtain a degree or other qualifications. Degrees or qualifications by themselves are not property in the context of the *Family Relations Act* so that a contribution to their acquisition is not within the criteria for redistribution under s.51. I am aware that there are those who advocate that 'career assets' such as a degree or a license to practice a trade or profession should be regarded as family assets so that a nonowner may be compensated for contributing to their acquisition: see, e.g.,

⁷² *Ibid.*, at 103.

⁷³ *Jackh*, *supra*, n. 60; *Wilson v. Wilson*, [1982] B.C.D. Civ. 1640-10 (S.C.); *Dickson v. Dickson*, [1981] 3 W.W.R. 91 (B.C.S.C.); *Underhill*, *supra*, n. 61. However, the court has granted an interest in patent rights: *Coulthard*, *supra*, n. 54. See also *Halemi*, *supra*, n. 34.

⁷⁴ *Jackh*, *supra*, n. 60, at 492.

⁷⁵ *Supra*, n. 55. In *Seakatchawan*, *Matrimonial Property Act*, S.S. 1979, c. M-6.1, s. 21(f) and Nova Scotia, *Matrimonial Property Act*, S.N.S. 1980, c. 9, s. 13(g) the courts may consider "the contribution by one spouse to the education or career potential of the other spouse" when determining an appropriate division of property.

⁷⁶ *Supra*, n. 55, at 4-5 (unrep.).

Economics of Divorce, U.C.L.A. Law Review, (1981) Vol. 28:1181. But until the law is prepared to recognize 'career assets' as family assets a person such as the plaintiff is without a direct claim for compensation.

What I assume Darling L.J.S.C. had in mind was that an indirect contribution to a business or venture asset (s.46(1) or s.45(3)(e)) might be comprised in a spouse's contribution to a qualification leading to the acquisition of such an asset. But this is not the case here.

7. MAINTENANCE

It has been suggested that the issues surrounding intangible assets such as degrees should be confined to maintenance considerations:⁷⁷

The decision also raises the troublesome point of whether a diploma is a family asset. In principle such "assets" should be restricted, again, to maintenance considerations. Although a spouse may have "assisted" with the obtaining of a diploma or degree, in general, . . . the diploma is a reward for hard work and effort. More importantly, the valuation of the diploma/degree presents severe problems. The diploma has no inherent value and is not transferable. It is the use it is put to by the holder that gives it whatever value it has. In order to "value" the diploma/degree, the only reference point would seem to be the increase in income the holder could anticipate from the use of the diploma. Such considerations can be adequately protected by maintenance orders. To order someone to pay "up front" for an asset whose value may never be actualized goes against the thrust of the pension cases. To order regular payments from income generated is maintenance and should be so treated.

In *Whitehead v. Burrell*⁷⁸ maintenance was awarded, apparently as a form of compensation, although the court indicated it would have reapportioned the family assets had there been any to divide. The facts of this case are illustrative of the problem. During the six year marriage the wife had worked, often at two jobs, while the husband completed a Bachelor of Commerce degree and then went on to law school. In the final year the husband became involved with another law student and separated from the wife. It was noted that the wife's financial contribution to the marriage had exceeded the husband's by \$45,000. The wife had returned to university, and the husband was obligated to pay maintenance of \$400 per month until she earned her first degree. It is apparent from the judgment that the court was attempting to provide compensation to the wife for roughly half of the \$45,000 she had contributed. It may be observed as well that the maintenance award was less than the wife required to attend school. The level of maintenance reflected the economic circumstances of the husband.

E. Summary

Under the *Family Relations Act*, a spouse is entitled to share in assets used for a family purpose. Entitlement to share in other assets depends upon contribution. The *Family Relations Act* provides that business assets and ventures, to which the non-owning spouse has contributed, are divisible as family assets.

⁷⁷ See annotation to *Jarvis*, *supra*, n. 55, at 145. See however, *Barley*, *supra*, n. 55, at 104-5, where it was observed: I should say that I have considerable sympathy with the examples of apparent injustice referred to in the U.C.L.A. Law Review. I have in mind, for example, the case of a wife who spends ten of her eleven years of marriage working outside the home in order to put her husband through medical school. The couple are divorced after the husband had become qualified but before they have acquired assets. The husband will have acquired a substantial earning capacity at his wife's expense. If she continues to work she will have little or no claim to maintenance. As the law exists here, and apparently in many of the states of the United States, the wife has no ground for a claim to compensation for devoting years of her life in paid work to assist her husband in obtaining a substantial earning capacity. And unless and until the *Family Relations Act* categorizes "career assets" as family assets, there would seem to be no relief for a wife in such position. Perhaps the doctrine of unjust enrichment can be extended to meet such a case.

⁷⁸ *Supra*, n. 55.

No provision is made for assets which are not used for a family purpose and which are not business assets or ventures. This represents a gap in the court's jurisdiction to divide spousal property. It is difficult to identify any policy to support this position, and it is likely that it was unintended. In some cases, courts divide such property by using a constructive trust.

The *Family Relations Act* provides that a venture is a family asset if the non-owning spouse made contributions to its acquisition. No other jurisdiction distinguishes between business assets and ventures. The meaning of venture is uncertain, but probably refers to assets acquired to earn income or profit but not for use in a business. Perhaps venture is used to mean investments in stocks or bonds. It is difficult to see what is gained by treating ventures separately from business assets.

The Act acknowledges that a non-owning spouse may make a direct or indirect contribution to the acquisition of property. Some doubt surrounds the concept of indirect contributions and authority is conflicting. Some courts are prepared to recognize that homemaking services are adequate contribution to support entitlement to business assets and ventures. Other courts take a stricter view, and require a substantial link between the value of indirect contributions and the acquisition of property. In effect, some courts are able to use the Act to achieve results not significantly different from those under the former law which protected separate property. Other courts rely upon the Act to divide property between the spouses in the same way as if the *Family Relations Act* provided for full community of property.

A. Introduction

Section 51 of the *Family Relations Act* provides the courts with jurisdiction to reapportion entitlement to property between spouses if its division under section 43 or a marriage agreement is unfair having regard to:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self sufficient; or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

The *Family Relations Act* does not define the word "unfair," and the factors to be taken into account listed in section 51 provide little practical guidance on that issue. As a result, the private views of each judge can become the single most important factor in a decision to redistribute. As MacDonald L.J.S.C. has noted:¹

The decisions also reflect the varying views of individual judges on the nature of the marriage relationship. . .

A judge who believes that the matrimonial relationship is a permanent union of body and soul is less likely to redistribute than a judge who considers the matrimonial relationship to be merely an association of two persons for specified purposes, and only for the time being. The jurisprudence regarding section 51 is now quite extensive. Consensus, however, has yet to emerge.

The criteria for determining unfairness listed in section 51 seem comprehensive. Every variable relating to the purchase and maintenance of any asset, including business assets, and every variable relating to the marriage itself appears to be included except matters which can be described as "fault", "conduct", and perhaps "intention". Three difficulties become apparent at once.

First, the section provides no clue concerning the circumstances which would justify redistribution. For example, the duration of the marriage is a factor which must be considered. The Act, however, suggests no guidelines as to how long a marriage must have subsisted before a court is justified in concluding that it is no longer a factor relevant to an application for redistribution.

Second, the section provides no instructions on the ranking of the different factors against each other or against the policy contained in section 43. Which of the six criteria is the most important? The result is that whenever opposing sides can justifiably rely on one or more of the criteria, the Act ceases to provide any assistance in determining whether a property division is unfair.

Lastly, the Act provides no criteria regarding the fixing of appropriate shares in family assets. How should the court proceed after a decision has been made to redistribute? For example, under section 51(a), the Act neither

¹ *Gwynn v. Forzyth*, (1962) 40 B.C.L.R. 358, at 372-3, 31 R.F.L. (2d) 188 (S.C.).

indicates what length of marriage gives rise to reapportionment, nor the amount by which differences in length of marriage should affect the eventual division of family assets.

Instead of explicit guidelines, the Act confers the power on the courts to reapportion when "unfairness" will result unless redistribution is ordered. What is "unfairness"?² The Act does not say. The following analysis is divided into several sections but the reader should remember that, regardless of the matter under discussion, the only issues before the courts are whether sufficient "unfairness" has been shown to justify reapportionment under section 51, and what interest in family assets each party should reasonably obtain.

B. Factors Relevant to an Inquiry Under Section 51

Section 51 lists factors courts must consider on an application and these are discussed later in this chapter. Section 51, however, appears to invite a searching inquiry into the general circumstances of the spouses' relationship. It is instructive to see what circumstances the courts consider relevant in this respect.

The following is a list of a number of factors which have been considered in section 51 applications. In virtually every instance, authority conflicts on whether these factors are relevant. In the next section we will consider in some detail the factors listed under s. 51. The following discussion is intended only to indicate the level of confusion generated by the ambiguous provisions of s. 51.

1. HELP FROM PARENTS OF ONE SPOUSE IN THE FORM OF SALE OF PROPERTY ON FAVOURABLE TERMS

In *Blockberger v. Blockberger*,³ the court found that the assistance of one spouse's parents justified an unequal division of family assets:

In arriving at the allocation of the shareholdings between the husband and the wife I have to take account of a number of factors. Although most of the shares came to the husband by way of gift from his father, the increase in the value of those shares during 1968 to 1980 was in significant measure due to the efficient management of the printing business, and in this management the husband played the leading role. In the distribution of the other assets, the wife has \$90,383 in her favour. Further, the wife received from the husband the substantial sum of \$100,000 in cash. . . In order to draw that sum out of the business, the husband was required to pay, in taxes, approximately \$100,000. . . Based on these considerations, I would make the division of the shareholdings in Greenblock Holdings of 90% to the husband and 10% to the wife.

In several other cases, it has been held that help from parents in the form of a sale on favourable terms is not a factor to consider.⁴

2. CONDUCT OF THE PARTIES DURING THE MARRIAGE

In *Czujko v. Czujko*,⁵ the court held that if the non-owner caused the break-up of the marriage, then the brevity of the marriage is given greater

² All Canadian common law provinces provide the court's with jurisdiction to depart from equal sharing, but British Columbia is the only jurisdiction to define that jurisdiction by use of a general term with no fixed legal meaning. All other Canadian common law jurisdictions use technical terms which indicate that the level of unfairness must be significant. In Saskatchewan, Ontario, and New Brunswick, for example, equal sharing must be inequitable before the courts may vary it. Newfoundland and Nova Scotia employ the concept of unconscionability. In Manitoba, the courts may not depart from equal sharing unless it would be "grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature or value of any of their assets."

³ (1983) 48 B.C.L.R. 235, 241 (B.C.C.A.); see also *Pavich v. Pavich*, [1981] B.C.D. Civ. 1654-01 (S.C.); *Alcock v. Alcock*, [1984] B.C.D. Civ. 1654-04 (S.C.), where a 14% reduction in price from the parents resulted in redistribution; *Sleightholme v. Sleightholme*, [1982] B.C.D. Civ. 1654-03 (S.C.).

⁴ *Wood v. Wood*, (1980) 20 B.C.L.R. 252, 17 R.F.L. (2d) 72 (S.C.); *Baird v. Baird*, (1981) 33 B.C.L.R. 17, 25 R.F.L. (2d) 17 (C.A.); *Bulich v. Bulich*, [1982] B.C.D. Civ. 1649-01 (S.C.).

⁵ [1983] B.C.D. Civ. 1654-04 (S.C.).

weight than if the owner caused the break-up. In *Heaps v. Heaps*,⁶ it was held that the conduct of the parties during marriage cannot be considered in a division of assets, but then the court refused to permit the husband to "take advantage of" the short marriage and ordered an equal division of the home.⁷ In other cases,⁸ it has also been held that the spouses' conduct is irrelevant.

3. RISE IN THE VALUE OF ASSETS AFTER SEPARATION DUE TO INFLATION

Case authority is divided on whether an inflationary increase in the value of assets should be taken into account when dividing family assets.⁹

4. CONTRIBUTIONS BY ONE SPOUSE TO MAINTAINING ASSETS AFTER SEPARATION

After separation, one spouse frequently uses assets to the exclusion of the other spouse. For example, one spouse may continue to live in the matrimonial home, and incur expenses in its upkeep. In one line of cases, this factor is taken into account when reapportioning entitlement to property.¹⁰ In another line of cases, it has been held that money spent on the upkeep of an asset used by the spouse does not entitle the spouse to a greater share of it. These courts often take into consideration the value to the spouse of the continued use of the asset.¹¹

5. A LENGTHY SEPARATION PRIOR TO APPLICATION FOR RELIEF

Courts divide on how a lengthy separation affects the selection of a valuation date, the principle of equal sharing, and entitlement to increases in value.¹²

6. THE BUSINESS ACUMEN OF ONE OF THE SPOUSES

In *Leveque v. Freed*,¹³ the marriage lasted four years. The husband brought the matrimonial home and certain business properties into the marriage. The husband's natural ability to earn income, it was held, justified an equal division of the home and an award to the wife of a share of business assets larger than she otherwise would have received. In *Margolese v. Margolese*,¹⁴ the relevance of industry and acumen were upheld, although in somewhat ambiguous terms. In *Blockberger v. Blockberger*,¹⁵ one factor

⁶ (1981) 20 B.C.L.R. 382, 17 R.F.L. (2d) 119 (S.C.).

⁷ See also *Johnstone v. Johnstone*, (1981) 33 B.C.L.R. 368, 26 R.F.L. (2d) 18 (S.C.); *Mitchell v. Mitchell*, [1981] B.C.D. Civ. 1664-06 (S.C.).

⁸ *Worobieff v. Worobieff*, (1980) 19 B.C.L.R. 241, [1980] 4 W.W.R. 683 (S.C.); *Stummeler v. Stummeler*, (1979) 14 B.C.L.R. 57, 11 R.F.L. (2d) 83 (S.C.).

⁹ *Mayuk v. Mayuk*, (1981) 25 B.C.L.R. 57 (S.C.); *Day v. Day*, (1981) 29 B.C.L.R. 363, 23 R.F.L. (2d) 93 (S.C.); in a Saskatchewan case, the wife was denied most of the inflationary increase during the marriage: *Dombiczak v. Dombiczak*, (1983) 32 R.F.L. (2d) 89 (Sask. Q.B.). In *Kropacek v. Kropacek*, (1982) 36 B.C.L.R. 296 (S.C.) the wife did not contribute to the business after the separation. She was entitled to share in the increase resulting from inflation, but not from any increase resulting from hard work by the husband; see also *Houle v. Houle*, (1981) 28 B.C.L.R. 1 (S.C.); *Czujlo*, *supra*, n. 5.

¹⁰ *Grau v. Grau*, (1982) 28 R.F.L. (2d) 457 (B.C.S.C.); *Day*, *ibid.*; *Wiebe v. Wiebe*, (1983) 33 R.F.L. (2d) 62 (B.C.S.C.); *Kirk v. Kirk*, (1981) 22 R.F.L. (2d) 360 (B.C.S.C.); *Allison v. Allison*, [1984] B.C.D. Civ. 1645-05 (S.C.); *Davis v. Davis*, [1984] B.C.D. Civ. 1654-03 (S.C.); *Armason v. Armason*, (1981) 32 B.C.L.R. 292 (S.C.); *Froh v. Froh*, [1981] B.C.D. Civ. 1656-04 (S.C.); *Paulson v. Paulson*, [1984] B.C.D. Civ. 1645-03 (S.C.); *Krammer v. Krammer*, [1984] B.C.D. Civ. 1645-07 (S.C.).

¹¹ *Zaurrini v. Zaurrini*, (1981) 33 B.C.L.R. 15, 22 R.F.L. (2d) 161 (C.A.); *Johnson v. Johnson*, [1984] B.C.D. Civ. 1654-05 (C.A.); these cases and others hold that any advantage gained by the non-occupying spouse is balanced by the use of the home which the occupying spouse has had.

¹² *Mayuk*, *supra*, n. 9; *Little v. Little*, (1982) 29 R.F.L. (2d) 370 (B.C.S.C.); *Beestlstone v. Beestlstone*, [1983] B.C.D. Civ. 1640-06 (S.C.); *Hauf v. Hauf*, [1981] B.C.D. Civ. 1645-16 (S.C.); *Christensen v. Christensen*, [1981] B.C.D. Civ. 1656-02 (S.C.); *Barnes v. Barnes*, [1981] B.C.D. Civ. 1645-13 (S.C.); *Wiebe*, *supra*, n. 10; *Middleton v. Middleton*, (1980) 15 R.F.L. (2d) 174 (B.C.S.C.), where a 14 year separation resulted in a redistribution of the home of 1/35 in favour of the occupying spouse; cf. *Wilson v. Wilson*, (1983) 37 R.F.L. (2d) 205 (B.C.C.A.); *Armason*, *supra*, n. 10; *Thu v. Thu*, (1979) 12 R.F.L. (2d) 289 (B.C.S.C.).

¹³ [1983] B.C.D. Civ. 1640-04 (S.C.).

¹⁴ (1981) 30 B.C.L.R. 381, 24 R.F.L. (2d) 176, [1981] 6 W.W.R. 585, 592 (C.A.).

¹⁵ (1983) 48 B.C.L.R. 235, at 240-241, 36 R.F.L. (2d) 241 (C.A.).

which led to unequal division of the business asset was that the increase in its value during the lengthy marriage was due to the husband's efficient management of the business. In a short marriage, the fact that a husband is a wise investor is not a ground for redistributing the matrimonial home, but is a ground for redistributing the business asset.¹⁶

A similar consideration is the weight to be given to the hard work and industry of one spouse. In a series of cases,¹⁷ the courts have reapportioned assets in favour of the industrious spouse. In *Keyser v. Keyser*,¹⁸ on the other hand, it was held that:¹⁹

... the company assets were improved and flourished because of ... [the husband's hard work, but] this does not constitute a circumstance making it unfair that the spouses should share equally. This is not a case of a new business developed after separation by one spouse.

The spouses had been married for 22 years, and this factor outweighed the husband's industry.

7. THE FACT THAT MAINTENANCE HAS NOT BEEN PAID

The cases to contrast on this factor are *Allison v. Allison*²⁰ and *Hoyer v. Hoyer*.²¹

8. THE EXISTENCE OF THE BUSINESS ASSET PRIOR TO THE MARRIAGE, NOTWITHSTANDING A LENGTHY MARRIAGE

In *Gwynn v. Forsythe*,²² it was held:

The duration of this relationship was some 12 years, making that element a neutral one. ... It must be kept in mind that the husband was a wealthy man at the time this relationship was established in 1964 and that his business was already established and successful. While it grew during the period of this relationship, I consider the amount of the husband's net worth in 1964 and the fact that his business had by then been successfully established for a number of years to be of considerable significance.

In *Grekul v. Grekul*,²³ however, an equal division, subject to deduction of sums invested by the husband in the business prior to the marriage, was ordered after an eight year marriage.

9. SUMMARY

The foregoing list is by no means exhaustive of the conflict of authority generated by s. 51, and may, in some respects, be misleading. Often it is difficult to assert with precision what is the ratio of a case. For example, in *Baird v. Baird*,²⁴ the trial judge redistributed the home in favour of the husband because, among other things, the wife obtained further education during the five year marriage. The Court of Appeal overruled the trial court's decision and ordered an equal division of the home. One conclusion that might be drawn from the Court of Appeal decision is that the increased employment opportunities made available to the wife as a result of the

¹⁶ *Levaque v. Freed*, *supra*, n. 13, where the wife, after a marriage subsisting less than four years, obtained 50% of the family home and 30% of the business.

¹⁷ *Heape v. Heape*, (1981) 20 B.C.L.R. 382, 17 R.F.L. (2d) 119 (S.C.); *Collins v. Collins*, [1982] B.C.D. Civ. 1640-08 (S.C.); *Margolese*, *supra*, n. 14, *Robertshaw v. Robertshaw*, (1979) 17 B.C.L.R. 137, [1980] 2 W.W.R. 215 (S.C.).

¹⁸ (1982) 39 B.C.L.R. 325, 30 R.F.L. (2d) 38 (S.C.).

¹⁹ *Ibid.*, at 45.

²⁰ *Supra*, n. 10.

²¹ (1981) 32 B.C.L.R. 41, 24 R.F.L. (2d) 444 (S.C.), overruled without comment: (1982) 41 B.C.L.R. 27, 30 R.F.L. (2d) 261 (C.A.).

²² 40 B.C.L.R. 358, 31 R.F.L. (2d) 188, at 206, *var'd* (1985) 45 R.F.L. (2d) 86 (B.C.C.A.).

²³ [1983] B.C.D. Civ. 1640-10 (S.C.).

²⁴ (1981) 29 B.C.L.R. 136 (S.C.); *rev'd supra*, n. 4.

marriage are not relevant in a redistribution application, or that they are subordinate to the length of the marriage. In *Timmins v. Timmins*,²⁵ decided two years after *Baird*, the British Columbia Supreme Court awarded the home to the wife, notwithstanding an 11 year marriage. The court in *Timmins* held that the length of marriage is irrelevant and relied on *Baird* for that proposition. The court also held that since the wife had owned the home prior to the marriage, and the husband's employment opportunities had increased during the marriage, it would be unfair to divide the home equally. One could conclude from *Timmins* that increased employment opportunities are relevant to a section 51 application and that the length of marriage is of lesser significance. *Baird* and *Timmins* could thus be seen as inconsistent. On the other hand, it could also be argued that on the facts of *Timmins*, the issue of increased employment opportunities was relevant, while on the facts of *Baird*, the issue of increased educational opportunities was not relevant. In any event, it is obvious that both cases can be relied upon and distinguished in any case involving employment or educational opportunities.

The preceding discussion is only a brief overview of problems encountered by the courts in dealing consistently with the criteria listed in s. 51. In the next section we look at these criteria in greater detail.

C. Factors Listed in Section 51

The *Family Relations Act* lists factors that should be considered on an application under section 51. It does not indicate what weight should be given to those factors. That is an issue which has been left to the courts.

1. LENGTH OF MARRIAGE — SUBSECTION 51(a)

The duration of the marriage has been called "the single most important factor in assessing unequal divisions . . ." ²⁶ There is no doubt that many courts are prepared to reduce the share of the non-owning spouse considerably in the case of short marriages. However, notwithstanding a few notable exceptions, no serious attempt has been made to lay down guidelines for deciding the effect of a short marriage upon the distribution of family assets. The result is that it is impossible to estimate in advance the size of a possible reapportionment.

A one or two year marriage can result in an award to the non-owning spouse of:

- (1) Ten percent of all assets including home, bank account and three pension plans.²⁷
- (2) Twenty percent for a wife on welfare whose husband earns substantial income and owns substantial assets.²⁸
- (3) Thirty percent of the home, one of two companies, and cash on hand, together worth many hundreds of thousands of dollars.²⁹
- (4) Twenty-five percent of the home after a 14 day marriage.³⁰
- (5) One-third because the short duration of the marriage was a circumstance out of the wife's control. The court held that if great weight were to be given to that circumstance, the husband would, in effect, "take advantage of the short duration of the marriage."³¹

²⁵ [1984] B.C.D. Civ. 1654-06 (S.C.) *var'd* (1985) 46 R.F.L. (2d) 300 (B.C.C.A.).

²⁶ See annotation to *St. Jacques v. St. Jacques*, (1982) 25 A.F.L. (2d) 195, at 196 (Sask. Q.B.).

²⁷ *Robertshaw*, *supra*, n. 17.

²⁸ *Fries v. Fries*, [1983] B.C.D. Civ. 1624-01 (S.C.).

²⁹ *McCleery v. McCleery*, (1983) 46 B.C.L.R. 120 (S.C.).

³⁰ *Hefmann v. Hefmann*, [1979] 5 W.W.R. 122, (1979) 5 R.F.L. (2d) 122 (B.C.C.A.); the trial judge had divided the home equally.

³¹ *Heaps*, *supra*, n. 17. The court also ordered that both spouses continue to pay for the home in the same one-third/two-thirds proportion.

(6) One-third after allowance to the husband for the value of the land on which the home rests because the husband had bought it prior to the marriage, and 20% of all other assets including substantial real estate assets owned by the husband prior to the marriage because the parties had resided in a common law relationship for 3½ years prior to their one year marriage.³²

(7) Fifty percent because the wife "certainly earned her ½ interest," taking into account the husband's conduct.³³

Contrast a marriage longer than 10 years, which can result in an award of:

(1) Zero percent of the home, because the wife had owned the home prior to the marriage and the husband's opportunities for employment improved during the marriage.³⁴

(2) Twelve percent after 21 years of cohabitation because the wife's conduct during the last few years injured the husband's business.³⁵

(3) Only 25 percent of the value of the assets because
(a) the wife only contributed for four years out of 11,
(b) five years had elapsed since the separation, and
(c) inflation had made the home more valuable.³⁶

(4) Only a nominal award to one of the spouses.³⁷

(5) A return of the spouse's original investment plus interest, because of the lengthy separation.³⁸

(6) Fifty percent valued as at the date of the separation plus interest.³⁹

(7) Seventy-five percent to the non-owning spouse because she has no skills and had been in the home since she became pregnant at 18 years of age.⁴⁰

In marriages subsisting between two and 10 years, spouses have been held to be entitled to portions as small as 4%,⁴¹ or 5%,⁴² and as much as the entire equity in the home because the wife was innocent in the separation and had the greater need.⁴³

In one of the first decisions on the significance of length of marriage, Mr. Justice Taylor in *Stammler v. Stammler*,⁴⁴ attempted to lay down guidelines for reapportioning entitlement to family assets:⁴⁵

While it is not easy to find any clear indication of legislative intention in the language used, it is plain that the interest granted by section 43 is not granted by reason of the fact of marriage alone . . . it cannot be intended . . . that the parties be deemed . . . to have bestowed on each other at the time of marriage a half interest in all "family assets", present and future, as a term of the marriage partnership. . . The half interest granted by section 43 must therefore be an interest earned by the claimant during the marriage.

³² *McKelvie v. McKelvie*, (1982) 29 R.F.L. (2d) 446 (B.C.S.C.); see also *McIntosh v. McIntosh*, (1980) 20 R.F.L. (2d) 386 (S.C.).

³³ *McCann v. McCann*, [1981] B.C.D. Civ. 1647-06 (S.C.).

³⁴ *Thomson*, *supra*, n. 25.

³⁵ *Leung v. Leung*, [1983] B.C.D. Civ. 1640-02 (S.C.).

³⁶ *Mayak*, *supra*, n. 9. Arguably, the first ground was irrelevant. The two other grounds have been held not to be circumstances which warrant redistribution.

³⁷ *Duy*, *supra*, n. 9: a 17-year marriage.

³⁸ *Boettleson*, *supra*, n. 12: a 30 year marriage.

³⁹ *Gharibians v. Gharibians*, [1983] B.C.D. Civ. 1640-05 (S.C.).

⁴⁰ *Krug v. Krug*, (1982) 30 R.F.L. (2d) 178 (B.C.S.C.).

⁴¹ *Robins v. Robins*, [1983] B.C.D. Civ. 1643-01 (S.C.); see also *Forster v. Forster*, (1981) 36 B.C.L.R. 56, (1981) 24 R.F.L. (2d) 99 (B.C.S.C.).

⁴² *Stewart v. Stewart*, [1983] B.C.D. Civ. 1640-01; *var'd* (1984) 56 B.C.L.R. 375, 40 R.F.L. (2d) 396 (C.A.): an eight-year marriage. The trial award of 5% of the matrimonial home was part of an overall award that represented 22% of assets. On appeal the share was increased to 30%.

⁴³ *Arsons v. Arsons*, (1980) 25 B.C.L.R. 128 (S.C.).

⁴⁴ *Supra*, n. 8.

⁴⁵ *Ibid.*, at 60, 86.

It was held that 10 years is a reasonable term for "earning" 50% of the home and that, in a 2½ year marriage, where the home had been purchased prior to the marriage, the wife was entitled to ¼ of a half interest, or 12½% of the whole.

Stammler was approved, with reservations, in several cases. The Court of Appeal in *Baird v. Baird*,⁴⁶ for example, held that length of marriage was a relevant consideration, although the wife does not need to literally "earn" her interest.⁴⁷ Each spouse received an equal share after a five year marriage. In *Robinson v. Robinson*,⁴⁸ it was said that *Stammler* was a precedent "well worth following closely,"⁴⁹ however, the word "earned" should not be confused with the word "contribution." The latter word should be reserved for discussion of business assets which become family assets pursuant to sections 45 and 46, whereas a family home is *prima facie* a family asset.

More recently, the authority of *Stammler* has been rejected. In *Schlatter v. Schlatter*,⁵⁰ for example, the Court of Appeal held that the matrimonial home should be divided equally except in special circumstances. *Zaurrini v. Zaurrini*,⁵¹ suggests that a marriage of short duration is a special circumstance. The wife was awarded 15% of the value of the home after four years of cohabitation.⁵²

There is authority for the proposition that length of marriage is irrelevant. In *Timmins v. Timmins*,⁵³ Meredith J. held that the court should not consider length of marriage since "earning an interest" comes close to considering the spouse's conduct, which the courts should not do. His Lordship found that the husband was not entitled to any portion of the home after 11 years of marriage. In view of *Schlatter* and other decisions already mentioned, *Timmins* must be considered wrongly decided. Given the variety of reasoning advanced in this area, however, it is a rare case which can be confidently characterized as wrongly decided.⁵⁴

Calculating the duration of marriage has raised several issues which have not yet been resolved. Spouses may cohabit for a lengthy period before marriage. S. 51(a) directs the courts to consider the duration of the marriage. In practice, prior cohabitation is taken into account pursuant to s. 51(f).⁵⁵

In *Ho v. Ho*,⁵⁶ for example, the parties lived together for more than five years in a common law arrangement before marrying. They separated two years later. It was held that it would be unfair to treat the marriage as having subsisted for only two years, because the husband had made direct and

⁴⁶ *Supra*, n. 4.

⁴⁷ See also *Zaurrini*, *supra*, n. 11; cf. *Fumo v. Fumo*, [1984] B.C.D. Civ. 1654-13 (S.C.) where the matrimonial home was repossessed in favour of the wife since it was through her management that assets were acquired.

⁴⁸ (1981) 23 B.C.L.R. 193 (Co. Ct.).

⁴⁹ *Ibid.*, at 197.

⁵⁰ (1982) 41 B.C.L.R. 278, 32 R.F.L. (2d) 119, (C.A.).

⁵¹ *Supra*, n. 11.

⁵² Where the marriage is of short duration, the courts will sometimes consider entitlement to assets in terms of contribution, although s. 51 does not include that factor as being relevant with respect to the test of fairness. In *Deanne v. Cunningham*, [1985] B.C.D. Civ. 1654-01 (S.C.), e.g., the marriage lasted less than three years. The wife received a one-half share in the matrimonial home on the basis of indirect contributions. She had left a well-paying job and moved to B.C. for the marriage.

⁵³ *Supra*, n. 25.

⁵⁴ On appeal, the husband was awarded a 25% interest in the matrimonial home because of the length of the marriage: *supra*, n. 25. See also *Johnstone*, *supra*, n. 7.

⁵⁵ *Zastowny v. Zastowny*, [1984] B.C.D. Civ. 1645-14 (S.C.); *Sangster v. Sangster*, (1984) 55 B.C.L.R. 251, 40 R.F.L. (2d) 31 (C.A.); eight years of cohabitation followed by three years of marriage. It was observed that s. 51(f) permitted consideration of the premarital relationship; cf. *Lavigne v. Lavigne*, (1983) 48 B.C.L.R. 298 (S.C.), where premarital cohabitation was considered pursuant to s. 51(a). In Saskatchewan, the length of marriage is not a factor to be considered. Instead, the courts are directed to take into account the duration of cohabitation: *The Matrimonial Property Act*, S.S. 1979, c. M-61, s. 21(2)(b). This position is consistent with the philosophy that entitlement to share in family property depends upon contribution.

⁵⁶ [1982] B.C.D. Civ. 1640-15 (S.C.).

indirect contributions to the wife's business during the common law relationship. Since the husband contributed financially more to the marriage relationship than the wife, his share of the home should reflect the difference between their contributions. With respect to a business asset, it was held that the court should look at the total contribution to the wife's business over the five years of cohabitation, and give the husband credit of 5% per year, or 25% of the total.

Some confusion arises because the courts are directed to look at length of marriage rather than the period of cohabitation. It may be possible, for example, for courts to ignore contributions during cohabitation prior to marriage. It may also be possible for the courts to ignore the period during which the spouses have lived separate and apart. Clearly, different approaches can be adopted when considering the significance of the length of marriage. Providing instead that the courts must consider the length of cohabitation defines accurately the scope of the court's proper inquiry. Determining entitlement by reference to the duration of cohabitation is consistent with a theory that entitlement to family property depends upon contribution, and leaves little room for doubt concerning the significance of pre-marital cohabitation and of the time the spouses live separate and apart.

Reconciliation of spouses after marriage breakdown has also caused problems for courts trying to consider the duration of the marriage.

In *Donald v. Donald*,⁵⁷ it was held that where the parties separated and then reconciled, only the second period of co-habitation should be considered, since issues arising out of the first separation were resolved by way of agreement.

2. LENGTH OF SEPARATION — SUBSECTION 51(b)

(a) As a Corollary to s. 51(a)

Under Section 51(b), the court must consider "the duration of the period during which the spouses have lived separate and apart." In practical terms, Section 51(b) is a necessary corollary to Section 51(a). Under Section 51(a) the courts are to consider the length of marriage. The length of marriage is not limited to the time between marriage and marriage breakdown, but presumably continues until divorce. In many cases those time periods will roughly correspond, but sometimes they will not. Say, for example, the spouses marry in 1950, separate in 1951, and petition for divorce in 1985. The length of marriage is 35 years, and if that factor were determinative, the spouses would be entitled to equal shares of family assets ascertained and valued in 1985. Section 51(b) requires the courts to consider the length of separation and arrive at a more reasonable division of property.

(b) As It Relates to Valuation

Length of separation also has significance in another respect. The *Family Relations Act* provides no guidance on when entitlement to family property arises, nor on when family property and the respective interests of spouses should be valued. The courts may value family property by reference to a number of different events. For example, the date of separation, of a triggering event evidencing marital breakdown and of the trial itself, have each been used as a reference to value family property.⁵⁸

⁵⁷ (1981) 28 B.C.L.R. 240 (S.C.).

⁵⁸ In *Hatch v. Hatch*, [1985] B.C.D. Civ. 1676-02 (S.C.), the husband kept the wife dependent on him following their separation. Family assets were valued at the time of trial.

Length of separation may suggest an appropriate date for valuing family property. For example, the spouses may separate in 1980, and a trial to determine entitlement to family property may take place in 1985. During the period of separation, it is likely that property values will have changed significantly. The change in value may be due to economic circumstances, such as inflation, or to the efforts of one of the spouses. The courts must determine whether spouses should share in the increased or decreased value of family assets since separation. One spouse may have had the use of property or been put to expense maintaining it, and these considerations must also be taken into account.

It is difficult to determine exactly what weight the courts give length of separation, for several reasons. First, if length of separation is referred to in determining a valuation date, its later significance in determining an appropriate division of family property is masked. A court might, for example, select the date of separation to value family assets, and then also order a share of their increased value. A court might, on the other hand, select the date of trial to value family assets, and then divide them unequally to reflect the benefit received by one spouse who had their use and enjoyment during the period of separation, or to reflect changes in the value of assets since separation attributable to one spouse's efforts or conduct. Second, the courts have encountered difficulties in determining entitlement to, or responsibility for, the altered value of assets. They have also adopted inconsistent approaches in dealing with the value of use and enjoyment of family assets.

The significance of the length of separation, insofar as valuation is concerned, varies depending on the asset in question. Where the dispute concerns the matrimonial home, length of separation has little impact.⁵⁹ This consideration has greater importance when business assets are involved. In general, the court is willing to reapportion business assets where an increase in value since separation is due to the efforts of the owning spouse, but not willing to reapportion if the increase is due to other factors such as inflation or general economic conditions. The reapportionment often takes the form of valuing the business asset at the time of separation, and awarding interest on the non-owning spouse's share from the date of separation to the date of trial.⁶⁰

(c) Use and Occupation

Several attempts have been made to deal with the effect of a lengthy separation prior to trial as it relates to compensation for expenses incurred and use and occupation. The spouse in possession of the matrimonial home claims expenses for maintaining or improving it. The other spouse counterclaims for the value of the resident spouse's use and occupation of the home during the separation.

As a general rule, joint tenants cannot sue each other for use and occupation.⁶¹ Each is equally entitled to occupy the premises, and voluntary removal by one joint tenant cannot prejudice the other. However, while a deserting spouse cannot claim for use and occupation, a spouse who has been ousted from the home can.⁶² The law appears to be the same in other jurisdictions.⁶³ If the party in possession claims for expenses incurred after separation, he invites a counterclaim for use and occupation by the spouse not

⁵⁹ See, e.g., *Sweetin v. Sweetin*, (1984) 39 R.F.L. (2d) 438 (B.C.C.A.).

⁶⁰ See Chapter VIII, VALUATION.

⁶¹ *Mastron v. Cotton*, [1926] 1 D.L.R. 767 (Ont. C.A.).

⁶² *Pilski v. Pilski*, [1981] B.C.D. Civ. 1662-01 (S.C.), a case involving "constructive ouster"; *Harmeling v. Harmeling*, [1980] 6 W.W.R. 711, (1980) 18 R.F.L. (2d) 97 (B.C.S.C.).

⁶³ *Partington v. Partington*, (1982) 28 R.F.L. (2d) 435 (Sask. Q.B.).

in possession, regardless of whether the spouse not in possession deserted the home. The British Columbia Court of Appeal has held that the spouse in possession cannot claim for expenses because he had sole possession of the home. In effect, the claim for expenses is offset by the claim for use and occupation.⁶⁴ However, in *Froh v. Froh*,⁶⁵ it was held that the wife was entitled to credit for mortgage payments made by her after separation, while the husband was not entitled to occupational rent because the court was "prepared to allow him" credit for the increased value of the home for the three years after separation. In *Blanchard v. Blanchard*,⁶⁶ it was held that ordinarily the spouse in possession would be entitled to an accounting for mortgage payments, but where the wife pays the mortgage payment pursuant to an agreement, she cannot advance that claim. In *Thu v. Thu*,⁶⁷ the separation agreement did not deal with disposition of the matrimonial home, but did provide that the wife was to remain in occupation and pay all expenses. The court awarded 1/2 the value of the home to each spouse, and deducted from the husband's interest the sums expended by the wife for mortgage payments and for completing the basement. The court refused to credit the husband with occupational rent because the agreement did not make provision for it. In *Belcher v. Belcher*,⁶⁸ the court allowed the husband credit for mortgage payments and cost of improvements, but rejected the wife's countervailing claim for use and occupation on the ground that she left the home voluntarily. In *Arnason v. Arnason*,⁶⁹ the parties had been separated for seven years prior to the trial. After the separation, the husband paid all expenses and improved the home with materials and labour. The court held that the husband should get 55% of the home, and that, after the trial, he must pay \$650.00 per month for use and occupation until he bought out the wife's interest.

Advancing a claim for use and occupation is not entirely free of procedural difficulties. Authority on the need to plead a claim for use and occupation is inconsistent. It has been held that a spouse can sue separately for use and occupation,⁷⁰ but the claim must be specifically pleaded.⁷¹ In another case, it was held that if one spouse claims an accounting for expenses, the question of use and occupation must also be considered, whether it is pleaded or not.⁷² The British Columbia Court of Appeal, however, has held that it is not necessary to plead a claim for occupational rent.⁷³

(d) Inflation

The period during which the spouses have lived separate and apart often has little or no effect on redistribution of family assets,⁷⁴ although there are cases where it has a significant effect.⁷⁵ In many cases, changes in value are attributable largely to inflation, a factor which reflects the purchasing power

⁶⁴ *Zaurini*, *supra*, n. 11; see also *Kirk v. Kirk*, (1981) 22 R.F.L. (2d) 360 (S.C.); *Pope v. Pope*, (1985) 32 A.C.W.S. (2d) 112 (B.C.S.C.).

⁶⁵ [1981] B.C.D. Civ. 1656-04 (S.C.).

⁶⁶ [1980] B.C.D. Civ. 1680-05 (S.C.).

⁶⁷ (1979) 12 R.F.L. (2d) 289 (B.C.S.C.).

⁶⁸ (1981) 24 B.C.L.R. 277, 19 R.F.L. (2d) 352 (S.C.); see also *Oulton v. Oulton*, [1984] B.C.D. Civ. 1684-02 (S.C.); *Sloan v. Sloan*, [1985] B.C.D. Civ. 1662-01 (S.C.); in *Taylor v. Taylor*, (1983) 45 B.C.L.R. 7; 33 R.F.L. (2d) 213 (S.C.), the matrimonial home was valued at the date of trial and the husband received credit for mortgage payments. He was not allowed other expenses unless he submitted to a claim for occupation rent.

⁶⁹ *Supra*, n. 10, the spouses had lived separate and apart for seven years prior to trial; see also *Froh*, *supra*, n. 65, where, after a 3-year separation, the spouse in possession was awarded 55% of the value of the home.

⁷⁰ *Harmeling*, *supra*, n. 62.

⁷¹ *Borman v. Borman*, [1983] B.C.D. Civ. 1662-01 (S.C.).

⁷² *Mills v. Mills*, (1980) 20 R.F.L. (2d) 197 (B.C.S.C.).

⁷³ *Zaurini*, *supra*, n. 11.

⁷⁴ *Maynuk v. Maynuk*, [1981] B.C.D. Civ. 1640-01; *Day v. Day*, (1981) 23 R.F.L. (2d) 93.

⁷⁵ *Kropacek v. Kropacek*, (1982) 36 B.C.L.R. 296 (S.C.); *Houle v. Houle*, (1981) 28 B.C.L.R. 1; *Czajko v. Czajko*, [1983] B.C.D. Civ. 1654-04; *Dembriczak v. Dembriczak*, (1983) 32 R.F.L. (2d) 89 (Sask. Q.B.).

of money and not necessarily a change in the assets' value in real terms. In *Taylor v. Taylor*,⁷⁶ however, the court regarded inflationary increases as profit to be divided between the spouses:

Moreover, the major factor in the increase in value of her equity is the inflationary rise in the value of property. This enrichment does not correspond to any deprivation suffered by him. . . . [W]here concurrent owners benefit from a general increase in property values, there is no unjust enrichment where both have made some contribution to its acquisition.

3. DATE WHEN PROPERTY WAS ACQUIRED OR DISPOSED OF — SUBSECTION 51(c)

Subsection 51(c) requires the courts to look to the date of acquisition or disposition of property when determining whether a particular division of property is unfair. The relevance of this consideration is questionable for two reasons. First, the significance of this factor will vary depending on whether spousal entitlement derives from contributions to the family unit, or flows from the fact of marriage itself. Second, section 51(c) overlaps other considerations listed in s. 51, most particularly the duration of the marriage (s. 51(a)) and whether property was acquired through inheritance or gift (s. 51(d)).

In *Pavicic v. Pavicic*,⁷⁷ for example, the parents of the wife gave her property which became the spouses' home, seven years prior to the end of a 37 year marriage. The court awarded her 75% of the property on this ground, notwithstanding that the husband had expended \$10,000 on the home after separation.

On the other hand, in *Schoenfeld v. Schoenfeld*,⁷⁸ the husband inherited assets during the marriage and the wife was awarded one-half of those assets on the ground that the parties had intended to share everything. In *Laxton v. Laxton*,⁷⁹ the husband inherited a farm four years before the end of the marriage. The wife was awarded 50% of that asset notwithstanding that neither she nor the husband had ever used the land for any purpose. The apparent desire on the part of the husband and the wife to work other lands already given to the husband by the father was held to have been the effective reason for the inheritance.

In *Mearon v. Mearon*,⁸⁰ the spouses owned a home which had been subject to a mortgage until late in the marriage, when the husband used an inheritance to pay it off. The husband also had a right to a pension. Without discussion of the length of marriage, the court awarded the wife a one-half interest in the pension plan but only a one-third interest in the home, specifically because the inherited monies had been used to pay off the mortgage.

For the most part, entitlement to property acquired before marriage appears to be determined by reference to the duration of the marriage. If the marriage is of short duration, the non-owning spouse will often be entitled to only a nominal interest in property, whether acquired before or after marriage. If the marriage is lengthy, the non-owning spouse will frequently be entitled to a generous share.

Where property is acquired shortly before the end of a marriage, the courts' approach is difficult to decipher. The manner in which the property is acquired, rather than the date of its acquisition, is usually determinative.

⁷⁶ *Supra*, n. 68. This issue is discussed in greater detail in Chapter VIII, VALUATION; see also *Re Ludlow and McGraw*, (1985) 32 A.C.W.S. (2d) 138 (N.B.Q.B.).

⁷⁷ *Supra*, n. 3.

⁷⁸ [1984] B.C.D. Civ. 1650-01 (S.C.).

⁷⁹ [1982] 41 B.C.L.R. 194, 31 R.F.L. (2d) 337 (C.A.).

⁸⁰ [1984] B.C.D. Civ. 1654-01 (S.C.); see also *Verdow v. Verdow*, (1985) 32 A.C.W.S. (2d) 367 (B.C.C.A.) where a gift to the husband of an interest in the family farm, made after separation, was not a family asset.

Where property is acquired through gift or inheritance, the courts frequently determine entitlement by reference to the non-owning spouse's contributions to the family unit following acquisition of the property. Entitlement is determined by reference to sections 51(c) and (d) and, for the most part, depends upon a theory of contribution. The significance of s. 51(d) is discussed more fully in the next section.

An issue which appears to be unresolved is the relevance of s. 51(c) where property is acquired by use of a spouse's income or savings, or by use of income or proceeds from other assets. The status of income and savings is discussed elsewhere in this Study Paper⁸¹ as is the issue of property acquired through income or proceeds derived from family property.⁸²

4. THE EXTENT TO WHICH PROPERTY WAS ACQUIRED THROUGH INHERITANCE OR GIFT — SUBSECTION 51(d)

The courts, on an application to reapportion entitlement to family property, are required to take into account the extent to which property was acquired through inheritance or gift. This consideration inevitably leads to some confusion. It suggests that an inheritance or a gift should be treated differently from other kinds of family assets. There are circumstances where there is no reason to treat an inheritance or gift differently from other family assets. For example, where one spouse owns a home prior to marriage purchased with monies earned from employment, after a lengthy marriage the other spouse will usually be entitled to a half interest in it. If the home was inherited before marriage, section 51(d) suggests that a different result should ensue. There would appear to be no reason to distinguish between entitlement to premarital property by reference to the manner in which the owning spouse acquired it.

Where property is received by gift or inheritance some time after marriage, then it is possible to justify a different treatment for it than for other family assets, but this factor is already taken into account under subsection 51(c). In fact, the courts approach gifts and inherited property in a manner similar to that accorded business assets.⁸³ Entitlement seems to depend upon some unarticulated theory requiring contribution.

In some cases, a lengthy marriage following receipt of property by gift or inheritance will justify equal division.⁸⁴ In other cases, however, the fact of gift or inheritance remains a strong factor in favour of unequal division notwithstanding a lengthy marriage.⁸⁵

In *Graham v. Graham*,⁸⁶ it was held that a prospective inheritance or a contingent interest were not family assets.

5. THE NEED OF EACH SPOUSE TO BECOME OR REMAIN ECONOMICALLY INDEPENDENT AND SELF-SUFFICIENT — SUBSECTION 51(e)

(a) *Maintenance v. Entitlement to Family Property*

The courts are required to consider economic independence and self-sufficiency as a factor in determining entitlement to family property. This

⁸¹ See Chapter IV, FAMILY ASSETS.

⁸² *Ibid.*

⁸³ *Simpkins v. Simpkins*, (1983) 41 B.C.L.R. 75, 32 R.F.L. (2d) 1 (C.A.); see also *Duncan v. Duncan*, (1984) 42 R.F.L. (2d) 66 (B.C.C.A.); *Shu-Jung (Quan) v. Dick (Quan)*, (1981) 38 B.C.L.R. 68 (S.C.).

⁸⁴ *Anderson v. Anderson*, (1980) 26 B.C.L.R. 11 (S.C.); 14 year marriage, asset divided equally; see also *Carson v. Carson*, [1984] B.C.D. Civ. 1645-12 (S.C.), where it was specifically held that the effect of inheritance diminishes over time. See also *Murphy v. Murphy*, (1984) 44 R.F.L. (2d) 60 (B.C.S.C.).

⁸⁵ *Alcock v. Alcock*, [1984] B.C.D. Civ. 1654-04 (S.C.), a 14% reduction in purchase price resulted in a reapportionment 45%/55% in favour of the spouse whose parents sold the property to the spouses; see also *Sleightholme v. Sleightholme*, [1982] B.C.D. Civ. 1654-03 (S.C.).

⁸⁶ (1985) 59 B.C.L.R. 27 (B.C.C.A.)

requirement blurs the distinction between property rights and maintenance obligations. One may easily question whether this factor has any relevance in determining entitlement to property. Its inclusion has invited the courts to take inconsistent views on its significance.

In some cases, the courts appear to pay only lip service to this factor. For example, in *Fries v. Fries*,⁸⁷ the parties had been married for about two years. At the time of the trial, the wife was receiving welfare and the husband was employed as a banker and had substantial savings. The court noted these factors and divided the matrimonial home 80/20 in favour of the husband. The result in *Fries*, however, is not significantly different from the results in other cases involving marriages of short duration where the issue of economic independence has not arisen.

In *Grant v. Grant*,⁸⁸ the court found that:⁸⁹

The husband is 53 years of age and the wife is 55 . . . his earnings should improve. The training of the wife is limited to secretarial work . . . her earning power is clearly less than his. . . . An equal division would be unfair.

The court then redistributed the matrimonial home 45%/55% in favour of the wife.

In other cases, the need for economic independence and self-sufficiency has significantly affected the courts' orders.⁹⁰ The issue of the need for economic independence and self-sufficiency will arise where one spouse, by reason of age, inexperience or infirmity is unable to earn a living. It will also arise where there is a disparity in the earning capacities of the spouses. The courts disagree on whether these factors are to be taken into account when dividing property or when determining support obligations.

In a number of cases, courts have relied on s. 51 (e) to vary entitlement to family property.⁹¹ In a number of other cases, however, it has been held that maintenance is the more appropriate way to deal with a disparity in income earning capacity.⁹²

(b) Lump Sum v. Periodic Maintenance

In *Atchison v. Atchison*,⁹³ the trial judge ordered lump sum maintenance, apparently because the wife wanted to return to Ontario. The court ordered that the home, which was the only significant asset, be sold and that the husband pay \$15,000 to the wife from his portion of the proceeds of sale. This decision was reversed on appeal. The Court of Appeal ordered that the

⁸⁷ [1983] B.C.D. Civ. 1654-01 (S.C.).

⁸⁸ (1982) 28 R.F.L. (2d) 457 (B.C.S.C.).

⁸⁹ *Ibid.*, at 461.

⁹⁰ In *Zarychta v. Zarychta*, [1985] B.C.D. Civ. 1645-03 (S.C.) *s.g.*, it was held that the needs of the wife for economic independence outweighed the substantial contribution made to family assets by the husband. *Takacs v. Takacs*, [1982] B.C.D. Civ. 1640-01 (S.C.); income-producing property owned by the husband prior to the marriage was a family asset because the income from the property had been used for a family purpose. The property was reapportioned in favour of the wife in order to enhance her chances for "future independence"; see also *Day*, *supra*, n. 8; *Arsens*, *supra*, n. 43; *Birnie v. Birnie*, [1980] B.C.D. Civ. 1647-30 (S.C.); *Scobie v. Scobie*, [1981] B.C.D. Civ. 1645-01 (S.C.) *aff'd* 28 R.F.L. (2d) 319 (B.C.C.A.); *Kirk*, *supra*, n. 10; *Silverwood v. Silverwood*, (1981) 27 B.C.L.R. 392 (S.C.); *Peacock v. Peacock*, (1983) 35 R.F.L. (2d) 218 (B.C.S.C.); *Beynon v. Beynon*, (1982) 37 B.C.L.R. 273 (C.A.); *Krug*, *supra*, n. 40. In *Richardson v. Richardson*, (1984) 43 R.F.L. (2d) 312 (B.C.C.A.) it was held that a temporary imbalance in the economic well-being of the spouses was not an appropriate consideration in itself to justify reapportioning entitlement to family assets; see also *Hackett v. Hackett*, (1984) 43 R.F.L. (2d) 5 (B.C.S.C.). "Independent" means independent of the need to lean on the opposite party for support, not independent of the need to earn a living: *Sokolofsky v. Sokolofsky*, [1984] B.C.D. Civ. 1654-11 (S.C.).

⁹¹ *Barnes v. Barnes* (1981) B.C.D. Civ. 1645-13 (S.C.); *Peters v. Peters*, [1981] B.C.D. Civ. 1645-09 (S.C.); *Hauptman v. Hauptman*, (1981) 32 B.C.L.R. 119 (S.C.), where the wife's poor health was the critical factor in the decision to use the trial date to value a pension plan, resulting in a share greater than the *Rutherford* formula would allow; *Kirk*, *supra*, n. 10; *Silverwood*, *ibid.*

⁹² *Parrish v. Parrish*, [1980] B.C.D. Civ. 1647-29 (S.C.); *Peterson v. Peterson*, [1982] B.C.D. Civ. 1664-04 (S.C.); *Nemitz v. Nemitz*, [1981] B.C.D. Civ. 1618-02 (S.C.); *Graystone v. Graystone*, [1981] B.C.D. Civ. 1647-25 (S.C.); the court concluded that it had the jurisdiction to reapportion assets on this ground, but declined to do so; *Green v. Green*, (1982) 36 B.C.L.R. 48 (S.C.); *Berry v. Murray*, [1983] 1 W.W.R. 561, (1982) 30 R.F.L. (2d) 308 (B.C.C.A.).

⁹³ (1980) 17 R.F.L. (2d) 164 (B.C.C.A.).

husband pay periodic maintenance instead of the lump sum awarded by the trial judge.

As a general rule, lump sum maintenance will not be awarded, unless the court has reason to believe the income earning spouse will fail to meet his support obligations.^{93a}

(c) Lengthy Marriages

The cases in which the issue of economic independence presents the gravest problems involve lengthy marriages. After a marriage of some duration, the homemaker usually has few skills with which to earn income. The husband's skills may well have been developed while the wife worked in order to support both parties, or raised children, or learned to manage the household frugally. The husband's skills can be viewed as assets which were acquired at the expense of the wife. In such cases, the wife may be compensated by periodic maintenance,⁹⁴ redistribution of assets,⁹⁵ or an award of an interest in the husband's business.⁹⁶

(d) Practice

It has been held that consideration of an appropriate division of family property must precede any consideration of maintenance.⁹⁷ This approach is consistent with the provisions of the *Family Relations Act*, which requires that property issues be treated separately from maintenance issues.⁹⁸ These issues are dealt with in different parts of the Act. Part 3 of the Act is devoted to property matters, while maintenance issues are covered in Part 4. However, subsection 51(e), which is in Part 3, can have no meaning unless the issue of maintenance is at least considered, so some cross-reference is necessary. The Court of Appeal noted this, and held that under Part 3 of the Act "the wife is not given property as maintenance, though there is an element of maintenance introduced by s. 51(e)."⁹⁹ The receipt by a spouse of a generous share of capital may very well remove the need for maintenance. In *Day v. Day*,¹⁰⁰ for example, the wife received a generous share of the home. The wife's application for maintenance was refused because her share of property allowed her to retain her independence and become self-sufficient.

(e) Need to Keep Assets Intact

There are circumstances where both spouses benefit from keeping assets intact. In these cases, often the best course is to leave the bulk of assets with one spouse and order generous maintenance for the other. In *O'Connell v.*

^{93a} *Panninger v. Panninger*, [1985] B.C.D. Civ. 1623-04 (C.A.); in *O'Riordan v. O'Riordan*, (1985) 46 R.F.L. (2d) 180 (B.C.S.C.), for example, the court said that lump sum maintenance would be inappropriate since it would, in effect, constitute a division of non-family assets. In *Arzenault v. Arzenault*, (1985) 46 R.F.L. (2d) 193 (B.C.S.C.), however, the court awarded lump sum maintenance, payable from the proceeds received from the sale of the matrimonial home, effectively altering the division of property ordered.

⁹⁴ *Berry*, *supra*, n. 92; *Graystone*, *ibid.*; *Nemitz*, *ibid.*; *Peterson*, *ibid.*; *Tholl v. Tholl*, (1985) 44 R.F.L. (2d) 337 (B.C.S.C.); *McKibbin v. McKibbin*, [1985] B.C.D. Civ. 1614-06 (S.C.); *Simphair*, *supra*, n. 83.

⁹⁵ *Vance v. Vance*, (1981) 23 R.F.L. (2d) 397 (B.C.S.C.); *McCreadie v. McCreadie*, (1982) 29 R.F.L. (2d) 188 (S.C.); *Hortluff v. Hortluff*, [1984] B.C.D. Civ. 1670-05 (S.C.); *Cunningham v. Cunningham*, [1985] B.C.D. Civ. 1643-01 (S.C.); *Slehu v. Slehu*, [1981] B.C.D. Civ. 1645-14 (S.C.); *Dzuba v. Dzuba*, [1983] B.C.D. Civ. 1676-04 (S.C.).

⁹⁶ *Blochberger*, *supra*, n. 15; *Coulthard v. Coulthard*, (1984) 38 R.F.L. (2d) 78 (S.C.). See also *Edgar v. Edgar*, (1984) 53 B.C.L.R. 100, 39 R.F.L. (2d) 436 (S.C.) and *Rushon v. Rushon*, (1984) 38 R.F.L. (2d) 308 (B.C.S.C.) where the wife was compensated with an ongoing interest in the husband's pension plan.

⁹⁷ *Slanz v. Slanz*, (1984) 42 R.F.L. (2d) 390 (B.C.C.A.); *Loyva v. Loyva*, (1985) 61 B.C.L.R. 77 (B.C.C.A.). It has also been held that the court must value assets before determining whether entitlement to them should be repositioned: *Capozzi v. Capozzi*, (1984) 53 B.C.L.R. 232, 39 R.F.L. (2d) 340 (C.A.).

⁹⁸ *Bisnic v. Bisnic*, (1984) 42 R.F.L. (2d) 334 (S.C.); *Hachett v. Hachett*, (1984) 43 R.F.L. (2d) 5 (B.C.S.C.); in *Ratzliff v. Ratzliff*, [1984] B.C.D. Civ. 1643-16 (S.C.) the husband's failure to pay maintenance was not a factor to consider when varying entitlement to family property. This case differs, however, from those where one spouse is unable to pay maintenance.

⁹⁹ *Rutherford v. Rutherford*, (1981) 30 B.C.L.R. 145, at 150, 23 R.F.L. (2d) 337, at 343 (C.A.).

¹⁰⁰ (1981) 29 B.C.L.R. 363, 23 R.F.L. (2d) 93 (S.C.). See also *Weharten v. Weharten*, [1981] B.C.D. Civ. 1614-03 (S.C.); *Groves v. Groves*, [1981] B.C.D. Civ. 1614-10 (S.C.); *Penny v. Penny*, [1981] B.C.D. Civ. 1624-01 (S.C.); *Behon v. Behon*, (1981) 28 B.C.L.R. 145 (S.C.); *Lavoie v. Lavoie*, [1983] B.C.D. Civ. 1670-01 (S.C.).

O'Connell,¹⁰¹ this reasoning was adopted. It was observed that the court may render both parties dependent rather than independent if it fails to consider the consequences of a division of assets. Similarly, in *Peterson v. Peterson*,¹⁰² the court refused to reapportion the matrimonial home because it considered that generous maintenance was more appropriate. The court rested its conclusion on the finding that, even if it redistributed the matrimonial home in favour of the wife, she would still not have sufficient funds to purchase a new home.

6. "ANY OTHER CIRCUMSTANCES . . ." — SUBSECTION 51(f)

Subsection 51(f) directs the courts to consider:

any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse.

Other criteria listed in subsection 51 refer to discrete issues relating to family property. Subsection 51(f) is general in its terms and, in fact, overlaps the other listed factors. It has been held that subsection 51(f) was not intended to cover exceptional circumstances only.¹⁰³ Any relevant factor may be considered. Beyond that, however, not much is settled. Some particular aspects of the operation of s. 51(f) have been considered.

(a) *Separate Estates*

Occasionally, spouses will keep their property and financial affairs separate. The *Family Relations Act* does not explicitly recognize this kind of arrangement even though in many of these cases ordering the sharing of family assets would be inappropriate. Courts have relied upon subsection 51(f) in order to recognize the spouses' arrangements.¹⁰⁴ In *Robins v. Robins*,¹⁰⁵ the wife was awarded 4% of the family assets in the husband's name because throughout the marriage, she maintained her own income, bank accounts and investments. In *Forster v. Forster*,¹⁰⁶ the marriage lasted for 4½ years. The court found that during the marriage the spouses had not pooled their resources, had kept separate accounts, and the husband alone had paid for expensive renovations to the home. The wife's contributions to the marriage were described as "minimal". Based on the spouses' arrangement of their financial interests, the court awarded the wife \$1000 in respect of her interest in the matrimonial home.

In *Raines v. Raines*,¹⁰⁷ the home was excluded as a family asset because the parties had kept assets separate during their marriage.

(b) *Unequal Contributions*

Subsection 51(f) also permits the courts to take into account unequal direct contributions to family assets.¹⁰⁸ In *Girard v. Girard*,¹⁰⁹ the husband paid more for the down payment and monthly payments for the home than the

¹⁰¹ [1981] B.C.D. Civ. 1645-11 (S.C.).

¹⁰² *Peterson*, *supra*, n. 92; see also *Tsonis v. Tsonis*, [1985] B.C.D. Civ. 1654-04 (S.C.) with respect to the goal of maintaining at least one viable family unit (in that case, the father and children) and the need for a family home.

¹⁰³ *Margolese*, *supra*, n. 14.

¹⁰⁴ See, e.g., *Bawtinheimer v. Bawtinheimer*, (1984) 56 B.C.L.R. 25 (S.C.), cf. *Raines v. Raines*, [1983] B.C.D. Civ. 1623-01 (S.C.); see also *Thiara (Tehara) v. Thiara (Tehara)*, (1984) 42 R.F.L. (2d) 257 (B.C.S.C.), where the spouses' financial arrangements were designed to benefit their extended family. These arrangements reflected the spouses' ethnic culture and were characterized by the court as being similar to a marriage agreement.

¹⁰⁵ *Supra*, n. 41.

¹⁰⁶ *Supra*, n. 41.

¹⁰⁷ *Supra*, n. 104.

¹⁰⁸ *Elsom v. Elsom*, (1984) 49 B.C.L.R. 297, 37 R.F.L. (2d) 150 (C.A.); see also *Girard v. Girard*, (1983) 42 B.C.L.R. 305, 33 R.F.L. (2d) 79 (C.A.); *Johastone*, *supra*, n. 6; *Hofmann*, *supra*, n. 30, the action was based on section 8 of the 1972 *Family Relations Act*; *Strain v. Strain*, [1984] B.C.D. Civ. 1643-02 (S.C.). Weighing the respective contributions of spouses may also arise under other criteria listed in s. 51. In *Zambolin v. Zambolin*, [1985] B.C.D. Civ. 1645-04 (S.C.), e.g., it was held that the value of property brought into the marriage (s. 51(c)) was offset by the value of the husband's contribution during the marriage; *Murphy v. Murphy*, (1984) 44 R.F.L. (2d) 60 (B.C.S.C.).

¹⁰⁹ *Ibid.*

wife. During the three year marriage, both spouses paid into a common pool, in proportion to their income, the sums necessary to maintain the property. The Court of Appeal divided the family property in the same proportions as their contributions.

At the stage at which the court considers whether an asset is a family asset, the concept of "contribution" is theoretically no longer relevant. Under the *Family Relations Act* contribution is significant only to determine whether ventures or business assets should be regarded as family assets. The matrimonial home is a family asset even in the absence of contribution. This was recognized in *Hunt v. Hunt*,¹¹⁰ where the court dismissed evidence of contribution as irrelevant with respect to redistribution of the matrimonial home. It is probably an error in law for the courts to consider respective contributions to the matrimonial home under the *Family Relations Act*. Nevertheless, courts have considered contribution in determining entitlement to family assets.

In *Day v. Day*,¹¹¹ the parties had been married for 17 years, but the husband was awarded only a nominal interest in the home because since separation he had not contributed to the support of his wife or child. The court also noted that the home had appreciated in value since the separation and the wife had assumed sole responsibility for its upkeep.

In *Wilgosh v. Wilgosh*,¹¹² the wife preserved the matrimonial home after the husband deserted the family. She paid the debts of the family. The court awarded the wife 100% of the home, in part on the ground that her contribution warranted such a reapportionment.

In *La Rue v. La Rue*,¹¹³ the wife made the down payment for the home, and the mortgage payments were drawn from a joint account into which both spouses deposited their income. The court held that the portion of the mortgage payment attributable to the husband was less than the cost of rental accommodation and that therefore the husband had made no financial contribution to the home and should receive only 25% of the value of the home after a 7½ year marriage.

(c) Other Factors

The broad nature of s. 51(f) is illustrated by a number of other factors cited in various cases. The respective ages of the spouses is frequently regarded as a relevant consideration.¹¹⁴ The courts have reapportioned entitlement to family assets to favour the spouse who has custody of children of the marriage.¹¹⁵ Courts also rely on subsection 51(f) to reapportion family assets to take into account property not subject to the *Family Relations Act*.¹¹⁶

Under s. 51(a) the courts are to take into account the duration of the marriage, a different concept from cohabitation. In *Sangster v. Sangster*,¹¹⁷ it was held that premarital cohabitation could be considered under s. 51(f).

¹¹⁰ (1981) 27 B.C.L.R. 134 (S.C.).

¹¹¹ *Supra*, n. 9.

¹¹² [1983] B.C.D. Civ. 1654-08 (S.C.).

¹¹³ [1982] B.C.D. Civ. 1654-02 (S.C.).

¹¹⁴ See e.g., *Murchie v. Murchie*, (1984) 39 R.F.L. (2d) 385 B.C.C.A.; in *Magro v. Magro*, [1984] B.C.D. Civ. 1645-08 (S.C.) and *Sangster v. Sangster*, (1984) 55 B.C.L.R. 251, 40 R.F.L. (2d) 31 (C.A.) this factor was considered in relation to the need for each spouse to be economically independent (s. 51(e)).

¹¹⁵ *Bateman v. Bateman*, (1984) 42 R.F.L. (2d) 120 (B.C.C.A.) *Magro*, *ibid.*; *Kirby v. McDonald*, [1984] B.C.D. Civ. 1645-27 (S.C.); *Fobes v. Bowler*, [1985] B.C.D. Civ. 1645-06 (S.C.); cf. *Nicolette v. Nicolette*, [1985] B.C.D. Civ. 1645-01 (S.C.), where it was held that this factor was only relevant with respect to the issue of maintenance; *Borsato v. Borsato*, [1985] B.C.D. Civ. 1671-01 (S.C.) is to similar effect, although the court relied on s. 51(e) and found that the spouse with responsibility for the children was also in a better position to become economically self-sufficient.

¹¹⁶ *Britten v. Britten*, (1983) 37 R.F.L. (2d) 329 (S.C.) involving assets located outside of the jurisdiction; cf. *Derrickson v. Derrickson*, (1984) 51 B.C.L.R. 42, 38 R.F.L. (2d) 1 (B.C.C.A.), involving Indian reserve lands.

¹¹⁷ *Supra*, n. 114; see also *Pishor v. Pishor*, (1981) 27 B.C.L.R. 230, 22 R.F.L. (2d) 257 (C.A.).

D. Summary

1. SECTION 51

After the courts have determined what property is susceptible to division, they still face many problems determining an appropriate division. The criteria listed in s. 51 are comprehensive, but so general that in practice they are not particularly helpful. The weight courts give to these various considerations frequently varies according to the views of individual judges on the significance of marriage and the impact of the *Family Relations Act* on entitlement to property.

The criteria listed in section 51 suggest that entitlement to property depends upon a number of different, and sometimes antithetical, bases. Duration of marriage (s.51(a)) and length of separation (s. 51(b)) suggest that entitlement to property was regarded by the legislature as an incident of marriage itself. Length of marriage, without regard to respective contributions by the spouses to acquiring assets, is the test. The date property was acquired (s. 51(c)) or the extent to which property was acquired through inheritance or gift (s. 51(d)) are considerations which suggest that there are different classes of assets within the general classification of family assets. In these cases, entitlement may depend upon presumed contribution (flowing from the length of marriage), actual contribution (as if these kinds of family assets were, in fact, business assets) or the intentions of the spouses.

Requiring courts to consider the need for economic independence suggests that maintenance considerations rank equally with entitlement following from a theory of contribution or as an incident of marriage. Section 51(f), which directs the courts to consider any other relevant consideration, further complicates the problems of philosophy underlying section 51. It permits the court, depending upon the circumstances of the case, to give greater weight to the significance of marriage, contribution, maintenance, intention or conduct, as these factors may relate to reapportionment.

For the *Family Relations Act* to work well, a unified approach to determining entitlement to property should take into account all of the factors listed in section 51, but there should be a structure to the courts' approach, imposing a hierarchy on listed criteria, so that entitlement in different cases is determined according to a consistent theory.

It is, for example, open to the courts to interpret the provisions of the *Family Relations Act* in the following way: Entitlement to family property is determined by reference to the value of the respective contributions of the spouses to the family unit. As a general rule, homemaking services are contributions equal in value to money provided by an income earner. In the case of a lengthy marriage, barring unusual circumstances, both spouses should be deemed to have made equal contributions entitling them to equal shares in family property. In the case of a marriage of short duration, some inquiry into the value of actual contributions is called for, and whatever division is appropriate for property acquired during the marriage, various classes of family assets may be divided differently. Family assets which deserve special treatment are those which, by reason of the date or manner of acquisition may qualify as separate property. Property acquired before marriage or received as a gift or inheritance may deserve this kind of special treatment. Entitlement to these kinds of assets then more clearly depends upon contribution to the family unit. In the case of a lengthy marriage, contribution will usually be presumed, and there is usually no need to distinguish between various kinds of assets. After an appropriate division is determined, the courts

should consider whether one spouse should contribute to the maintenance and support of the other spouse. If maintenance is called for, but periodic payments are inappropriate in the circumstances, the division of family property may be amended accordingly.

Many courts appear to adopt this approach under section 51, but the exceptions to it are numerous and reflect the differing interpretations that may reasonably be placed on the *Family Relations Act*. A court which divides family property (including property owned before marriage) more or less equally after a short marriage views the *Family Relations Act* as providing that equal entitlement follows from the fact of marriage. A court which divides family property unequally after a lengthy marriage views entitlement as depending upon proof of actual contributions to the acquisition of property. These kinds of inconsistencies can only be corrected by more clearly defining the philosophy underlying the *Family Relations Act*.

2. CRITERIA FOR DETERMINING ENTITLEMENT V. CRITERIA FOR DETERMINING DIVISIBLE PROPERTY

There are several systems of community property and it is probably incorrect to contrast the approach adopted in Canadian and other Commonwealth jurisdictions as being distinct from community property. The chief distinction between the British Columbia *Family Relations Act* and more traditional community property systems is the degree of discretion given the courts in determining what property is divisible and the share to which each spouse is entitled. Apart from that, the features of the British Columbia system of shared property rights can also be found in other community property jurisdictions. In British Columbia the non-owning spouse's rights in property are deferred to marriage breakdown. Some community property jurisdictions adopt this approach, and others instead vest interests immediately but defer management and control of property. Quebec, for example, adopts a system of deferred division.¹¹⁸

In British Columbia, property used for a family purpose is divisible between the spouses, but the shares may be varied by reference to whether the property was acquired by gift or inheritance as well as by reference to when the property was acquired. Community property systems also distinguish between kinds of property depending on how and when it is acquired. Many community property systems provide that property acquired gratuitously (e.g., by gift or inheritance) remains the separate property of the recipient. In community property systems patterned after the Roman-Dutch model, premarital property is community property. The Spanish model, after which the American community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) is patterned, provides that premarital property is separate property. That approach is also adopted in Quebec.

Different philosophical bases underlie the Roman-Dutch model and the Spanish model of community of property, which lead to different objective rules for determining divisible property. British Columbia courts may, in effect, choose one model over the other as may be appropriate in the circumstances, without regard to these philosophical differences.

If the marriage is of short duration, British Columbia courts will adopt the Spanish or "ganancial" system, which confines divisible property to assets acquired during the marriage. If the marriage is of long duration, British Columbia courts will adopt the Roman-Dutch or "universal" system, which permits the division of premarital property.

¹¹⁸ Art. 493 C.C.Q.

A. Introduction

Under the *Family Relations Act*, the court has generous powers to determine entitlement to family property. Frequently, entitlement is expressed as a fractional or percentage share of family property. Determining entitlement is only the first step. After entitlement to family assets is determined, it must be decided how each spouse's share is to be satisfied. That might be done by appropriating specific property, selling property and dividing the proceeds from its sale, or requiring one spouse to buy, or pay compensation for, the other spouse's interest in specific property.

The source of the court's jurisdiction to determine issues of ownership or possession of property is section 52 of the *Family Relations Act*. That section has a broad scope. In addition to empowering courts to resolve issues of ownership or division of property, it also provides a remedy where one spouse conveys property to defeat the other spouse's claim to an interest in it.

B. Section 52(1)

Section 52(1) of the *Family Relations Act* provides as follows:

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

On marriage breakdown each spouse is entitled to an undivided half interest in family property. Even if the spouses do not question equal entitlement to family property, disputes may arise concerning the manner in which specific property is actually to be divided. In addition, not all property may be conveniently divided into shares. Under section 52(1), the court is given jurisdiction to divide property, determine ownership and to allocate specific assets to one spouse or the other.¹

C. Variation of an Order Under Section 52

Circumstances may prevent the division of property ordered by a court from taking place or alter the appropriateness of the division. The value of property may change. Property may be destroyed or lost through bad investments. One spouse may refuse to obey the court's order, or no longer be able to comply with it.

The court's order determines ownership of family assets and, in the usual case, changes in an asset's value will be borne by its owner. For example, the spouses own shares in a company and a home. The court orders that the husband is entitled to the shares and the wife is entitled to the home. A number of things might happen after the court's order is made, which would ultimately affect the fairness of the division. The value of the shares might rise or fall. Property values might similarly change. In these kinds of cases, there is little that can practically be done to alter the ordered division of property. Litigation must come to an end, and courts are incapable of continuously supervising a division of property to ensure it remains fair as circumstances change.

¹ Section 51 provides that the court may order property of one spouse not covered by section 43 or a marriage agreement be vested in the other spouse. The general power to vest an interest in property, however, is to be found in section 52. Section 52 may also be used to adjust the division of assets: See, section 52 (2)(c); see also *Rutherford v. Rutherford*, (1981) 44 B.C.L.R. 279, 23 R.F.L. (2d) 337 (C.A.).

With one exception, there is no jurisdiction in the courts to vary an order made under Part 3. Several sections lead to that conclusion. Section 20 states that the courts may vary or rescind an order, except an order made under Part 3, where circumstances have changed since the order was made or last varied. Other sections permit variation of an order for maintenance² or an order for custody or access.³ There is no comparable provision for varying an order for property. The court has the jurisdiction to vary its own order with respect to occupation of the matrimonial home or the date of sale, but not with respect to ownership.

The exception to the court's inability to vary an order relating to family property applies where one spouse prevents a division of property ordered by a court from taking place. In that case the innocent spouse can attempt to enforce the court's order, but that approach will not always be satisfactory. Under section 52, the courts have jurisdiction to vary an order dividing family property to ensure that the actual distribution of family property is appropriate.

In *Frost v. Frost*,⁴ the trial judge ordered an equal division of family property and a \$14,000 payment to the wife as lump sum maintenance. The husband did not make the payments required by the order to equalize the distribution of family assets or pay the lump sum required for maintenance. The husband also lost various family assets through investments.

The wife applied to another Supreme Court judge, pursuant to section 52, to vary the division of property ordered earlier. The new order vested title to the matrimonial home in the wife. The Court of Appeal held that the variation of the court's order pursuant to section 52 was appropriate in these circumstances. *Frost* involved an equal division of family assets under section 43 of the *Family Relations Act*, and the order under section 52 was made to ensure that equality of ownership and interest was properly carried into effect. It was also suggested that the court had a similar jurisdiction where an unequal division had been ordered under section 51.⁵

In *Quiring v. Quiring*,⁶ nothing prevented property from being divided in accordance with the court's order. One spouse, however, applied for variation of the order under section 52. The court held that it did not have jurisdiction under section 52 to vary the division of property in the absence of evidence that circumstances prevented the division in accordance with the court's earlier order.

D. Section 52(2)

Section 52(2) provides an unrestricted list of orders which may be made pursuant to the broad discretion contained in section 52(1):

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

- (a) declare the ownership of or right of possession to property;
- (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;

² Section 62. The British Columbia Court of Appeal held in *Stokes v. Stokes*, (1985) 46 R.F.L. (2d) 207, that there is no jurisdiction to vary an order relating to the division of property on the ground of change of circumstances.

³ Sections 30(1)(b) and 39.

⁴ (1983) 57 B.C.L.R. 245, 5 D.L.R. (4th) 62 (C.A.).

⁵ *Ibid.*; see also *Martin v. Martin*, (1980) 21 B.C.L.R. 142, 17 R.F.L. (2d) 285 (S.C.) where the court held it had jurisdiction to order a spouse to make a final payment to settle the division of the matrimonial home, notwithstanding the separation agreement which set a future date for payment.

⁶ (1984) 40 R.F.L. (2d) 274 (S.C.). See also *Sawyer v. Sawyer*, (1984) 42 R.F.L. (2d) 374 (B.C.S.C.).

- (c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;
- (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
- (e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
- (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property; or
- (g) where property is owned by spouses as joint tenants, sever the joint tenancy.

Paragraph 52(2)(c) is routinely employed by the courts to order a spouse to pay compensation to the other spouse "for the purpose of adjusting the division" of family property.⁷ This provision permits the courts to divide property or its value as may be appropriate in the circumstances. Often an award of money may cause less disruption to the parties and may also reduce the tax consequences of a division of property.

E. Assets with Little or No Present Value

Some assets are capable of being divided. If not, they may be sold and the proceeds divided between the spouses. Difficulties often arise in the division of assets whose value is nominal or contingent. A pension is a good example of this kind of asset. Before retirement, a person's pension often has only a nominal value. Section 52 permits the courts to divide family assets which are either not physically divisible or have no market value, through the use of a trust or an award of a continuing interest in the asset.

In *Coulthard v. Coulthard*,⁸ the wife was given a 20 percent interest in patent rights to be held in trust until such time as it was possible to transfer the interest. The patents were the subject of litigation, which prevented their disposition.

In *Halani v. Halani*,⁹ a company deemed to be a family asset had debts exceeding its equity by \$700,000. The court ordered that the wife receive one half the shares of the company.

The variety of orders concerning pensions is dealt with elsewhere in this Study Paper.¹⁰

F. Orders for Partition and Sale

Paragraph 52 (2)(d) permits the court to order the partition and sale of property. The court's jurisdiction to order partition under the *Family Relations Act* prevails over that under the *Partition of Property Act*.¹¹

⁷ Subsection 52(2)(c) has two branches. The first branch relates to orders for compensation "where property has been disposed of." The second branch permits orders for compensation to be made "for the purpose of adjusting the division" of family property. Where the property is immovable, (e.g. real property) and is located outside British Columbia, the court has no jurisdiction to divide and settle the property. *Woodward v. Woodward*, (1981) 30 B.C.L.R. 351, 23 R.F.L. (2d) 448 (S.C.); *Jeske v. Jeske*, (1982) 39 B.C.L.R. 396, 29 R.F.L. (2d) 348 (S.C.); *Duke v. Andler*, (1932) S.C.R. 734 cf. *Hamlin v. Hamlin*, (1985) 3 W.L.R. 629 (C.A.). Similarly, the court has no jurisdiction to make orders respecting Indian Reserve lands which fall under Federal jurisdiction: *Derrickson v. Derrickson*, (1984) 51 B.C.L.R. 42, 38 R.F.L. (2d) 1 (C.A.). However, the Court of Appeal has held that notwithstanding the lack of jurisdiction respecting reserve lands, the court may make an order under section 52(2)(c) "for the purpose of adjusting the division:" *ibid*. Whether this principle may be extended to order compensation where the court lacks jurisdiction to divide immovable or moveable property in other jurisdictions, is an open question; see *Britten v. Britten*, (1983) 50 B.C.L.R. 131, 37 R.F.L. (2d) 329 (S.C.).

⁸ *Coulthard v. Coulthard*, (1984) 38 R.F.L. (2d) 78 (B.C.S.C.).

⁹ [1985] B.C.D. Civ. 1640-02 (S.C.).

¹⁰ See Chapter IV, FAMILY ASSETS.

¹¹ *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 55(1).

The general rule regarding the court's discretion to grant or deny orders for partition under the *Partition of Property Act*¹² was set out by Seaton J.A. in *Harmeling v. Harmeling*,¹³

I think we ought to accept without qualification the general statement that there is a *prima facie* right of a joint tenant to partition or sale and that the court will compel such partition or sale unless justice requires such an order should not be made.

The discretion to refuse an order for sale, however, need not be limited to cases where there was a "want of good faith, or vexatious intent or conduct or malice in taking the proceedings."¹⁴

Where the court has jurisdiction under Part 3 of the *Family Relations Act*, a spouse may counter an application under the *Partition of Property Act* by an application under section 52.¹⁵ Section 52 then prevails with several important consequences.

Under the *Family Relations Act* the court may order partition and sale with the proceeds to be divided equally or unequally pursuant to section 43 or 51. Under the *Partition of Property Act*, the court may only order that proceeds be divided in proportion to the legal ownership of the property. Under the *Family Relations Act* the court may order that the interest of one spouse as joint tenant be sold to the other spouse, selecting a valuation date occurring prior to the partition application. In *Fuller v. Fuller*¹⁶ an application for partition of the matrimonial home under the *Partition of Property Act* was converted with consent to an application under section 52, at the other spouse's instigation. The court, citing section 51, noted it had jurisdiction to select the appropriate valuation date. The home was valued at separation (\$54,000), at the time of divorce (\$68,000) and at the time of trial (\$113,000). The court held that the wife was entitled to a half interest as joint tenant valued at the time of divorce and ordered that she sell her interest to the husband. In contrast, under the *Partition of Property Act* the spouse, as joint tenant, would be entitled to a half interest at the time of the partition order.¹⁷

In other respects, it appears that the court's discretion to grant or deny a partition application under section 52 is similar to the discretion under the *Partition of Property Act*. Generally, the court will order partition,¹⁸ unless there are special circumstances.¹⁹ Custody of children of the marriage is a relevant consideration in deciding whether to postpone or deny an order for partition. Where the children are near adulthood, partition will usually be ordered.²⁰ Often the presence of younger children will justify refusing²¹ an order, or postponing an application, for partition, until the youngest reaches

¹² R.S.B.C. 1979, c. 311, s. 4.

¹³ [1978] 5 W.W.R. 688, at 691, 90 D.L.R. (3d) 208 (B.C.C.A.).

¹⁴ *Ibid.*

¹⁵ *Meneghetti v. Meneghetti*, (1979) 11 R.F.L. (2d) 104 (B.C.S.C.).

¹⁶ (1982) 36 B.C.L.R. 237 (S.C.).

¹⁷ See, e.g., *Popadiuk v. Popadiuk*, [1979] B.C.D. Civ. 1664-05 (S.C.); *Borsato v. Borsato*, [1985] B.C.D. Civ. 1671-01 (S.C.).

¹⁸ See, e.g., *Meneghetti v. Meneghetti*, *supra*, n. 15; *Demers v. Demers*, [1980] B.C.D. Civ. 1664-04 (S.C.); *Dolesar v. Dolesar*, [1980] B.C.D. Civ. 1654-05 (S.C.); *Berry v. Berry*, [1980] B.C.D. Civ. 1654-06 (S.C.); *Anderson v. Anderson*, (1980) 26 B.C.L.R. 11 (S.C.); *Mitchell v. Mitchell*, [1981] B.C.D. Civ. 1664-06 (S.C.); *Papineau v. Papineau*, (1981) 24 R.F.L. (2d) 375 (B.C.S.C.); *Geck v. Geck*, [1981] B.C.D. Civ. 1664-09 (S.C.).

¹⁹ See, e.g., *Borsato*, *supra*, n. 17. See also *Puyrits v. Puyrits*, (1982) 26 R.F.L. (2d) 300 (B.C.S.C.); *McCarty v. McCarty*, [1982] B.C.D. Civ. 1670-07 (S.C.); *Lavoie v. Lavoie*, [1985] B.C.D. Civ. 1670-01 (S.C.) where the court awarded sole possession of the matrimonial home to the wife on the basis of section 51 and lump sum maintenance in circumstances where the other spouse had failed or was unlikely to pay maintenance.

²⁰ See, e.g., *Schembri v. Schembri*, [1981] B.C.D. Civ. 1664-01 (S.C.); *Seath v. Seath*, (1979) 18 B.C.L.R. 396 (S.C.); *Hatiras v. Hatiras*, [1983] B.C.D. Civ. 1664-02 (S.C.).

²¹ See, e.g., *Popadiuk*, *supra*, n. 17; *Greenlees v. Greenlees*, (1981) 23 R.F.L. (2d) 323 (B.C.C.A.); *Hoyer v. Hoyer*, (1981) 32 B.C.L.R. 41, 24 R.F.L. (2d) 444 (S.C.), *rev'd* (1982) 41 B.C.L.R. 27, 30 R.F.L. (2d) 261 (C.A.); *Sadler v. Sadler*, [1985] B.C.D. Civ. 1664-02 (S.C.).

nineteen years.²² In other cases, less weight is given to the presence of children, and only short postponements of the partition and sale (e.g. 2 years) have been ordered.²³ There are also a number of cases where, despite the presence of children, the court granted an order for partition and sale with no postponement.²⁴ No clear principles emerge as to when the court will exercise its discretion to deny an application for partition and sale. The Court of Appeal has observed in at least two cases, however, that the presence of children is a significant factor in the exercise of the discretion to refuse an order for partition and sale.²⁵

G. Section 52(3)

Just as a debtor might try to hide assets from his creditors to avoid paying them, some spouses attempt to avoid the provisions of the *Family Relations Act* by ridding themselves of their property. Section 52(3) provides a remedy in these circumstances:

(3) Where the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

In only a handful of cases has subsection 52(3) been successfully used to revoke a gift of property made with the intention of defeating a spouse's interest in it. The requirement of proof that the disposition was made for the purpose of defeating the claim of the other spouse is often difficult to satisfy. For example, in *Wagner v. Wagner*²⁶ the husband gave his son assets, not for the purpose of defeating the wife's interest in the property (even though it had that effect), but rather as a tax planning measure. The gift could not be set aside under section 52(3). Compensation, however, was awarded to the wife under section 52(2)(c).

In *Rutherford v. Rutherford*²⁷ the husband nominated another beneficiary of his pension to defeat his wife's interest in it. The court awarded the wife a half interest in the pension after the husband's death, effectively reversing half the disposition.

H. Compensation for Assets Conveyed Away

I. GENERALLY

Where a spouse gives property to a third party who sells it to a *bona fide* purchaser for value, subsection 52(3) has no application.²⁸ In these circum-

²² See, e.g., *Gray v. Gray*, [1979] B.C.D. Civ. 1647-14 (S.C.); *McCauley v. McCauley*, (1980) 21 B.C.L.R. 209 (S.C.); *Lam v. Lam*, [1980] B.C.D. Civ. 1664-08 (S.C.); *Girard v. Girard*, [1980] B.C.D. Civ. 1664-09 (S.C.); *Scott v. Scott*, [1981] B.C.D. Civ. 1664-03 (S.C.); *Redhead v. Redhead*, [1983] B.C.D. Civ. 1664-01 (S.C.); *MacWilliam v. MacWilliam*, [1983] B.C.D. Civ. 1664-07 (S.C.).

²³ See, e.g., *Caskey v. Caskey*, (1979) 14 B.C.L.R. 193, 10 R.F.L. (2d) 85 (S.C.); *Bradley v. Bradley*, [1980] B.C.D. Civ. 1664-06 (S.C.); *Eddy v. Eddy*, [1981] B.C.D. Civ. 1664-04 (S.C.); *Giles v. Giles*, [1983] B.C.D. Civ. 1664-05 (S.C.).

²⁴ See, e.g., *Hepburn v. Hepburn*, [1979] B.C.D. Civ. 1664-11 (S.C.); *Richards v. Richards*, (1980) 23 B.C.L.R. 32 (S.C.); *Koch v. Koch*, [1980] B.C.D. Civ. 1664-13 (S.C.); *Cross v. Cross*, [1982] B.C.D. Civ. 1664-02 (S.C.); *Peterson v. Peterson*, [1982] B.C.D. Civ. 1664-04 (S.C.); *Temple v. Temple*, [1983] B.C.D. Civ. 1664-09 (S.C.).

²⁵ *Greenlees*, *supra*, n. 21; *Hoyer*, *supra*, n. 21.

²⁶ (1982) 36 B.C.L.R. 68 (S.C.).

²⁷ *Supra*, n. 1.

²⁸ *Sidwell v. Sidwell*, (1984) 42 R.F.L. (2d) 209 (B.C.C.A.); *Eberts v. Eberts*, [1984] B.C.D. Civ. 1674-14 (S.C.); *Farmer v. Farmer*, (1979) 10 R.F.L. (2d) 243 (B.C.S.C.); *Marineau v. Marineau*, [1984] B.C.D. Civ. 1647-03 (S.C.).

stances the courts may employ section 52(2)(c), ordering a spouse to pay money to the other spouse in compensation for the property disposed of.²⁹

In *Dickson v. Dickson*,³⁰ it was held that the word "property" in section 52(2)(c) refers to any property disposed of even though the disposition occurred before the Act came into force. Where property is not a family asset, however, the court cannot order payment of compensation for its disposition. For example, in *Penner v. Penner*,³¹ the Court of Appeal held that a lump sum payment as an inducement to take early retirement was not a disposition of family property. The forfeited pension entitlement was never property to which either spouse had become entitled. There was therefore no disposition under section 52(3). Similarly, the disposition of employment income after separation has been held not to be property for which an order for compensation may be made.³²

2. "DISPOSED OF"

The words "disposed of" in subsection 52(2)(c) have been interpreted broadly by the courts. For example, a mortgage of the matrimonial home by one spouse without the consent of the other spouse, has been referred to as a "clandestine disposition" and "sufficiently reprovable" to warrant an order for compensation.³³ In another case, the husband rendered the matrimonial home uninhabitable, failed to make mortgage payments and disposed of mineral claims. The court ordered the payment of compensation under section 52(2)(c).³⁴ It is apparent that there need not be a termination of proprietary rights for there to be a disposition. Cases in which one spouse is responsible for diminishing the value of property have been characterized as dispositions of property.³⁵

3. RELEVANCE OF CONDUCT

The conduct of the spouses has been held not to be relevant to the division of property under s. 51,³⁶ but improper conduct has been noted in a number of cases where awards of compensation under s. 52(3) have been granted. For example, in *Farmer v. Farmer*,³⁷ the husband threatened harm to his wife unless she transferred to him her interest in the matrimonial home. The property was transferred to a relative and later sold to a *bona fide* purchaser for value. Compensation for disposition of the matrimonial home was awarded to the wife.³⁸

4. TEMPORAL ASPECTS

Awards of compensation have been ordered where the disposition of property occurred prior to marital breakdown,³⁹ after separation but before a

²⁹ *Supra*, n. 7.

³⁰ [1980] B.C.D. Civ. 1647-15 (S.C.).

³¹ (1984) 42 R.F.L. (2d) 402 (B.C.C.A.).

³² *Jarvis v. Jarvis*, (1979) 14 B.C.L.R. 324, 14 R.F.L. (2d) 1 (S.C.); but see *Vance v. Vance*, [1981] 6 W.W.R. 431 (B.C.S.C.); *Vance v. Vance*, [1982] 2 W.W.R. 472, (1981) 34 B.C.L.R. 209, 26 R.F.L. (2d) 55 (S.C.).

³³ *Marineau*, *supra*, n. 28.

³⁴ *Eberts*, *supra*, n. 28.

³⁵ In *Biedler v. Biedler*, (1983) 33 R.F.L. (2d) 366 (B.C.S.C.), the court held that the loss of business assets subsequent to the triggering event (separation agreement) was due to the foolish and reckless course of dealing by the husband and an award of compensation was ordered. See also, *Fisher v. Fisher*, [1984] B.C.D. Civ. 1680-04 (S.C.).

³⁶ See, e.g., *Meneghetti*, *supra*, n. 15; *Murchie v. Murchie*, (1984) 53 B.C.L.R. 157, 39 R.F.L. (2d) 385 (C.A.).

³⁷ *Farmer*, *supra*, n. 28.

³⁸ See also *Sidwell*, *supra*, n. 28; *Eberts*, *supra*, n. 12; *Marineau*, *supra*, n. 28; *Vance*, *supra*, n. 32; *Biedler*, *supra*, n. 35; it has been held that the absence of an improper motive does not prohibit an order for compensation: *Wagner v. Wagner*, (1982) 36 B.C.L.R. 68 (S.C.).

³⁹ *Wagner*, *ibid.*; *Sidwell*, *supra*, n. 28.

triggering event,⁴⁰ and after a triggering event occurred.⁴¹ The date of the disposition is not a bar to awarding compensation pursuant to s. 52(2)(c).

5. VALUATION

A related issue is the date of valuation of assets which have been disposed of. Where the courts award compensation, the compensation is usually based on the value of the assets at the time of the disposition.⁴² Where the triggering event occurs after property has been disposed of, or the court selects a valuation date for family property subsequent to the date of disposition, frequently no order for compensation will be made.⁴³ Courts which adopt this approach tend to accept that whether or not compensation should be ordered is a discretionary issue. In one case involving a short marriage, however, the court held that s. 52(2)(c) could not assist a spouse where the matrimonial home was lost to creditors before a triggering event occurred.⁴⁴ This holding is inconsistent with authority which recognizes that the non-owning spouse has an interest in family assets even before the occurrence of a triggering event. Since the marriage was of short duration, however, the interest of the non-owning spouse would not have been substantial, and the outcome is consistent with other cases involving marriages of short duration.

⁴⁰ Eberts, *supra*, n. 28; Marineau, *supra*, n. 28; Vance, *supra*, n. 32.

⁴¹ Biedler, *supra*, n. 35.

⁴² *Ibid.*; Wagner, *supra*, n. 38; Sidwell, *supra*, n. 28.

⁴³ See, e.g., *de Verteuil v. de Verteuil*, [1981] B.C.D. Civ. 1647-03 (S.C.); *Fischler*, *supra*, n. 35.

⁴⁴ *de Verteuil*, *ibid.*

A. Introduction

The value of property may change over time, or property may be exchanged for other property. While the *Family Relations Act* provides that, on a triggering event, spouses each become entitled to an interest in family property, it provides no guidance as to the date the courts should use to determine the value of those interests.

B. Practice Under the Family Relations Act

Generally, entitlement to property can be determined in two distinct ways. A monetary value can be placed on a person's interest. This approach corresponds to awarding damages in compensation for a person's lost entitlement to property. Alternatively, entitlement can be expressed as a percentage interest in property, and a person be made legal owner of the property to the extent of his interest. This approach does not involve valuing the property at all. Property can be sold, and the proceeds from the sale can be divided among its owners according to their respective interests. Any increase or decrease in value of the share is borne by its owner. For the most part, courts in British Columbia adopt the first approach when dividing family property pursuant to the *Family Relations Act*.

An example is useful to demonstrate the differences between these two approaches. Spouses separate in 1975. At that time, the matrimonial home is worth \$50,000. The parties enter into a separation agreement in 1980, when the matrimonial home is worth \$75,000. In 1985, an application to determine entitlement to the matrimonial home, now worth \$100,000, is heard. The court finds that the spouses are each entitled to one-half of family assets.

1. PLACING A VALUE ON ENTITLEMENT

If the court attempts to value entitlement, it must choose a date for valuation. There is authority to support selecting the date of separation, the making of a separation agreement or the hearing as a valuation date. The non-owning spouse might receive 50% of \$50,000, \$75,000 or \$100,000.

2. DIVIDING PROPRIETARY INTERESTS

If the court confines its inquiry to determining how ownership of the property is to be divided, it need not determine a valuation date. The parties are each entitled to half the matrimonial home. If it is necessary to value their interests, that is done by reference to the current value of the matrimonial home. The current value is not determinative, however. The court must look to the reasons for its increased value. If the increase in value is due solely to economic changes over the years, then no adjustment is called for, (except, perhaps, an accounting between the spouses concerning contributions to maintaining the property, and the value of use and enjoyment.) Perhaps one spouse has invested money improving the property. In that case, the asset has been altered and part of its increase in value is due to those alterations. Should the other spouse be entitled to share in the increase in value attributable to these improvements?

The position is by no means certain, but the *Family Relations Act* suggests an answer. It is arguable that the *Family Relations Act* is based on the premise that contributions to the family unit, in terms of money or services, entitle spouses to share in family assets. When one spouse ceases making

contributions, he or she is no longer entitled to share in the increased value in assets attributable to the other spouse's efforts or contributions.

These concepts seem difficult to deal with, but similar concepts are handled without trouble in other areas of the law. For example, the law governing mixed funds deals with similar problems.

Say, for example, that a trustee mixes trust funds with his own money. The mixed fund consists of \$300: \$100 is the trustee's, \$100 A's, and \$100 B's. Equity recognizes that each party has a $\frac{1}{3}$ equitable proprietary interest in the fund. If the fund earns interest, it will be divided in equal parts among the owners of interests in the fund. If money from another party is added to it, that party also has an equitable interest in the fund. If any of the owners of the fund adds more money to it, his interest increases. Entitlement to family property can be thought of in the same way.

3. EXAMPLES FROM CASES UNDER THE FAMILY RELATIONS ACT

The extraordinary number of valuation dates chosen by courts suggests that the valuation date is perceived merely as a tool useful in reapportioning property. The problem for lawyers and litigants is that it has become impossible to predict how the court will choose to value an asset. Some examples:

- (1) The valuation date is the date the wife began to live with another man.¹
- (2) The valuation date is the date of trial because it is the best one in the circumstances.²
- (3) The valuation date is the date of actual separation; the absence of a separation agreement does not lead to the conclusion that the valuation date is the date of trial.³
- (4) The date of the triggering event is the date for creation of the interest, but the trial date is the date for valuation of assets.⁴
- (5) Pensions should be valued and divided as at the date of separation.⁵
- (6) The proper date for valuation of pensions is the date of the decree absolute of divorce.⁶
- (7) Because of delay in making a claim, the date of separation may be appropriate. But if the results of choosing that date are unfair, the court may choose the date of the hearing as the valuation date.⁷ On the other hand, delay in bringing an application does not disentitle a spouse to an increase in the value of the family asset caused by inflation.⁸
- (8) There is no *prima facie* rule as to what is the proper valuation date. Rather, the court may choose any date that seems the most fair in each case. The court can also use section 51 of the Act to adjust the financial award if there is unfairness.⁹

¹ *Christensen v. Christensen*, (1980) 19 R.F.L. 240 (B.C.S.C.).

² *Grange v. Grange*, (1982) 40 B.C.L.R. 145; 80 R.F.L. (2d) 432 (S.C.).

³ *Williams v. Williams*, (1982) 26 R.F.L. (2d) 325 (B.C.C.A.); *Jensen v. Jensen*, [1983] B.C.D. Civ. 1654-03 (S.C.); *Dresen v. Dresen*, (1979) 13 R.F.L. (2d) 97 (B.C.S.C.).

⁴ *Kent v. Kent*, [1981] B.C.D. Civ. 1647-01 (S.C.); in *Fischer v. Fischer*, [1984] B.C.D. Civ. 1680-04 (S.C.), entitlement was determined as of the date of separation but the assets were valued at the date of the order for dissolution of marriage.

⁵ *Rutherford v. Rutherford*, (1981) 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.); *Dedick v. Dedick*, [1981] B.C.D. Civ. 1647-39 (S.C.).

⁶ *Silverwood v. Silverwood*, (1981) 27 B.C.L.R. 392 (S.C.), or the decree nisi: *Baird v. Baird*, (1981) 29 B.C.L.R. 136; *var'd* (1981) 33 B.C.L.R. 120, 25 R.F.L. (2d) 17 (C.A.).

⁷ *Wiebe v. Wiebe*, (1983) 33 R.F.L. (2d) 62 (B.C.S.C.).

⁸ *Roney v. Roney*, (1981) 31 B.C.L.R. 121, 24 R.F.L. (2d) 315 (S.C.).

⁹ *Hauptman v. Hauptman*, (1981) 32 B.C.L.R. 119, [1982] 2 W.W.R. 62 (S.C.) citing *Mills v. Mills*, (1980) 20 R.F.L. (2d) 197 (B.C.S.C.) and holding that *Mills* is applicable to pension plans.

- (9) For a matrimonial home, the proper valuation date is the date of the triggering event.¹⁰ However, where the husband has been cruel to his wife, then the proper date for valuation of the matrimonial home is the date of separation some four years prior to the trial,¹¹ and where the non-residing spouse delayed in bringing her application, the proper date may be the date of separation with or without interest or the valuation date may be the date of trial coupled with a substantial reapportionment.

C. Approaches to Valuation

As previously mentioned, there are a number of different events which may mark appropriate valuation dates: the date the spouses separate, the date a separation agreement is made or some other triggering event occurs, or the date of the hearing when the court must decide entitlement.

The courts determine valuation according to the circumstances and, in some cases, the nature of the assets involved.

1. DATE OF SEPARATION

Many courts appear to prefer the date of separation for valuing assets.¹² The courts determine each spouse's share and place a value on it. Changes in the value of an asset following separation are not taken into account. The owning spouse benefits if the assets have appreciated in value; the non-owning spouse benefits if the value of the assets has diminished. Where assets have increased in value, some courts have compensated the non-owning spouse by ordering interest, or an amount equal to interest, which the monies would have earned from the time of separation to the date of trial.¹³ Other courts, however, have declined to award interest in these circumstances.¹⁴

Courts which favour the time of separation for valuing assets act on the theory that after that time, the non-owning spouse is generally no longer in a position to make contributions to the acquisition, operation, or maintenance of assets.¹⁵ Courts which favour a later valuation date proceed on the basis that the non-owning spouse no longer needs to contribute, or that, notionally, the non-owning spouse's contributions are still effective. This might occur where the spouses were married for a significant period of time, or the owning spouse acquired skills during the marriage which were used to enhance the value of family assets.¹⁶

¹⁰ *Alterton v. Alterton*, [1981] B.C.D. Civ. 1644-01 (S.C.): the triggering event was the date of the trial for divorce.

¹¹ *Barnes v. Barnes*, [1981] B.C.D. Civ. 1645-13 (S.C.).

¹² *Maricic v. Maricic*, (1981) 27 B.C.L.R. 157 (S.C.); *Kury v. Kury*, [1980] B.C.D. Civ. 1647-19 (S.C.); *Teacher v. Teacher*, (1979) 21 B.C.L.R. 40, 10 R.F.L. (2d) 216 (S.C.); *Farmer v. Farmer*, (1979) 10 R.F.L. (2d) 216 (B.C.S.C.); *Murray v. Murray*, (1979) 11 B.C.L.R. 338 (S.C.); *Rutherford v. Rutherford*, (1981) 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.) where a pension was valued at the date of separation rather than the date of the triggering event but in circumstances that do not appear to directly override *Mills*, *supra*, n. 9, since the court specifically refused to lay down a general principle in respect of the proper date of valuation for pensions. Thus, Mr. Justice Eason's comment in *Mills* (at 205) that "nothing in the Act nor the cases decided under it establish any general rule" as to the date of valuation, remains valid. See also *Williams v. Williams*, (1982) 26 R.F.L. (2d) 325, at 328-9 (B.C.C.A.) where MacDonald J.A. said:

The effect of that judgment [*Rutherford*] is that there can be one date for the triggering event under s. 43, and another date for valuation of assets.

¹³ See, e.g., *Burnham v. Burnham*, (1980) 21 R.F.L. (2d) 139 (B.C.S.C.); *Williams*, *ibid*; *Gharabien v. Gharabien*, [1983] B.C.D. Civ. 1640-05 (S.C.); see also *Krupacek v. Krupacek*, (1982) 36 B.C.L.R. 296 (S.C.) the interest portion of the award was held to compensate the non-owning spouse for any inflationary rise in the assets after separation; *Demetrick v. Demetrick*, [1981] B.C.D. Civ. 1647-12 (S.C.); *Pope v. Pope*, [1985] B.C.D. Civ. 1676-05 (S.C.).

¹⁴ *Grekul v. Grekul*, [1983] B.C.D. Civ. 1640-10 (S.C.); in *Woff v. Woff*, (1980) 20 R.F.L. (2d) 218 (B.C.S.C.), the trial date was chosen to let the non-owning spouse share in the matrimonial home's increased value.

¹⁵ See, e.g., *Demetrick*, *supra*, n. 13; *Kury*, *supra*, n. 12 came to a similar conclusion based on the concept that assets acquired after separation have not been used for a family purpose; *Rid v. Rid*, (1985) 45 R.F.L. (2d) 173 (B.C.S.C.).

¹⁶ See, e.g., *Wince v. Wince*, (1981) 23 R.F.L. (2d) 397 (B.C.S.C.).

2. THE DATE OF THE TRIGGERING EVENT

Some courts choose the time of the triggering event as the valuation date. This is consistent with the *Family Relations Act* in that the triggering event is the time when entitlement to family assets arises.¹⁷

3. THE DATE OF THE HEARING

Courts which favour the time of hearing as the valuation date generally proceed on the basis that fairness between the parties requires a consideration of the current value of family assets. In *Mills v. Mills* it was said:¹⁸

[I] do not accept that the appropriate date for valuation for the purposes of an order under s. 52 is the date of the "triggering event." That is the date upon which interest arises under s. 43. . . . The value of the property at the date of the "triggering event" has no bearing upon the division of the proceeds. If the value increased between the date of the "triggering event" and the sale, the parties will share equally in that increase in value. . . . If the "triggering event" took place in September 1978, Mr. Mills acquired his interest under the Act at that time. The interest has gone up in value, as has the equal interest of his wife.

By basing the division upon present values, the principle of equality of interest is maintained. Were the division to be based on the value which the property had one year ago, the result would be an unequal division. . . . Neither the Act nor the cases decided under it establish any general rule that for the purposes of an order under s. 52(2) adjusting the division, the property should be valued either at the date of separation or of the "triggering event." There is power under ss. 51 and 52 to make an order having that effect, but that should, I think, be seen as a case of unequal division. Unless the circumstances are such as to make an equal division unfair, the principle of equality requires the use of values current at the time of the decision.

One noteworthy aspect of the *Mills* decision is that the court connected the valuation date with the concept of equal distribution. Mr. Justice Esson distinguished several cases which had held that the appropriate date for valuation is the date of separation by stating that they do not hold "anything more than that the court may employ that [date] as the valuation date if, in the circumstances, it is equitable to do so."¹⁹ *Mills* can be interpreted as establishing that *prima facie* the date of valuation is the date of trial, subject to circumstances which would make a different valuation date more fair.²⁰ Selecting the date of hearing as the valuation date seems fair in most cases and certainly has the advantage of simplicity. Even so, which valuation date ought to be used has not been finally resolved in the foregoing or in any other manner.

In several cases, the time of hearing was chosen because the value of assets had diminished since separation through no fault of the parties.²¹

D. The Utility of a Discretion to Fix a Valuation Date

What constitutes a fair division will frequently vary depending on each judge's personal views of the marriage relationship and what it entails. This is because the *Family Relations Act* does not define principles to guide the courts

¹⁷ See, e.g., *Haaf v. Haaf*, [1981] B.C.D. Civ. 1645-16 (S.C.); *Fuller v. Fuller*, (1982) 36 B.C.L.R. 237 (S.C.); *Atterton*, *supra*, n. 10.

¹⁸ *Supra*, n. 9, at 203-5; see also *Woff*, *supra*, n. 14; *Foy v. Foy*, (1981) 29 B.C.L.R. 393, 22 R.F.L. 331 (B.C.C.A.).

¹⁹ *Ibid.*, at 205.

²⁰ See, e.g., *Kent v. Kent*, [1981] B.C.D. Civ. 1647-01 (S.C.); *Berry v. Berry*, [1980] B.C.D. Civ. 1654-06 (S.C.); *O'Donnell v. O'Donnell*, [1981] B.C.D. Civ. 1647-26 (S.C.); *Young v. Young*, (1981) 20 R.F.L. (2d) 288 (B.C.S.C.); *Baird*, *supra*, n. 6; *Brimley v. Brimley*, [1982] B.C.D. Civ. 1680-06 (S.C.); *Simpkins v. Simpkins*, [1981] 5 W.W.R. 998 (B.C.S.C.) *rev'd* but not on this point, (1983) 41 B.C.L.R. 75 (C.A.); business assets were valued at the date of trial because that date was the date of the triggering event; *Fischer v. Fischer*, [1984] B.C.D. Civ. 1680-04 (S.C.); *Stewart v. Stewart*, (1984) 56 B.C.L.R. 375 (B.C.C.A.); *Schulzsky v. Schulzsky*, [1984] B.C.D. Civ. 1654-11 (S.C.).

²¹ See, e.g., *Simpkins*, *ibid.*; *Fischer*, *ibid.*; cf. *Eberts v. Eberts*, [1984] B.C.D. Civ. 1674-14 (S.C.) where the husband reduced the value of the home, and the date of separation was chosen for valuing assets; see also *Lyall v. Lyall*, [1985] B.C.D. Civ. 1641-01 (B.C.S.C.), where a depreciable asset was valued at the time of separation.

in determining a fair share of family property. The same problem arises when valuing a spouse's share of family assets. The discretion asserted by courts to choose a valuation date is regarded by courts as merely another flexible tool for apportioning family assets, or their value, between the spouses.

The way the law has developed, the courts exercise their discretion with respect to three separate issues:

- (i) what property is susceptible to division;
- (ii) what is the value of the property; and
- (iii) what is an appropriate division of the property.

Even if judges have similar views on two of these issues, a divergence of opinion on one issue will achieve totally different results on similar facts. Even so, only a few judgments openly acknowledge that the court uses the valuation date for the purposes of reapportionment. In *Carr v. Carr*,²² it was held that where reapportionment can be justified, and if a fair reapportionment can be accomplished by choosing a valuation date other than the trial date, the court is authorized to do so.²³

In *Anklewich v. Anklewich*,²⁴ the parties had been married for 25 years. The husband provided for the family during the first 15 years but lost money during the last 10 years. The parties separated in 1976. The husband was awarded 10% of the value of the home as at the date of trial in 1982. In *Jensen v. Jensen*,²⁵ the court faced a four year marriage in which the wife made the down payment for the home while the husband's salary was used to pay the mortgage. The husband was apparently fond of billiard halls. The court awarded him 1/3 of the home valued at the date of separation. The results in *Anklewich* and *Jensen* were roughly the same; only the tools used for achieving the results were different.

E. Practical Considerations

The wording of the *Family Relations Act* suggests that the courts should be determining proprietary interests and not determining an amount of money to compensate one spouse for an interest in property. The courts, however, usually prefer to deal with this question in terms of monetary value for two reasons. First, it is a more flexible guide to determining a fair share. Second, it is more convenient when dealing with different types of property. The court can look to the total value of family assets, instead of having to decide entitlement to a number of discrete items of property.

F. Business Assets

Although it has been held in cases involving non-business assets that the valuation date should generally be the date of trial because both spouses should share equally in any increase after separation, the tendency in cases involving business assets is to value the portion to which the non-owning spouse is entitled on the date of separation and award interest on that value.²⁶

²² (1982) 30 R.F.L. (2d) 63 (B.C.S.C.).

²³ See also *Mills*, *supra*, n. 9; *Fries v. Fries*, [1983] B.C.D. Civ. 1654-01 (S.C.); *Martelli v. Martelli*, (1982) 33 B.C.L.R. 145, 26 R.F.L. 1 (C.A.); where it was held that if the factors under s. 51 show that division pursuant to s. 43 would be unfair, then one method of achieving an equal division would be to pick a different valuation date; *Capozzi v. Capozzi*, (1982) 30 R.F.L. (2d) 145 (B.C.S.C.).

²⁴ [1983] B.C.D. Civ. 1654-02 (S.C.).

²⁵ [1983] B.C.D. Civ. 1654-03 (S.C.).

²⁶ See, e.g., *Ghorablene*, *supra*, n. 13; *Kropacsek*, *supra*, n. 13, where the interest portion of the award was held to compensate the non-owning spouse for any inflationary rise in the assets after separation; *Moud v. Faville*, [1982] B.C.D. Civ. 1642-06 (S.C.); *Burnham v. Burnham*, (1980) 21 R.F.L. (2d) 139 (B.C.S.C.); *Demerick*, *supra*, n. 13; *Boothstone v. Boothstone*, [1983] B.C.D. Civ. 1640-06 (S.C.); cf. *Idiens v. Idiens*, (1983) 32 A.C.W.S. (2d) 190 (B.C.S.C.).

There are, however, sufficient examples of other approaches to make it impossible to categorically state that any result will necessarily follow. Not all courts will award interest on the non-owning spouse's share.²⁷ Not all courts choose the date of separation as the valuation date,²⁸ especially where the increase in value occurred as a result of general economic factors and not the efforts of the owning spouse.²⁹ Some courts have, for example, awarded the non-owning spouse an interest in the property valued at the date of trial, but ordered that the non-owning spouse must first credit the owning spouse for all the sums invested by the latter, without interest.³⁰ Another method is reapportionment. In *Money v. Money*,³¹ there was a very large increase in the value of business assets between the date of separation and the date of trial. It was held that the valuation date was the date of trial but then the court redistributed the asset 55-45 in favour of the owning spouse.

G. Summary

It is difficult to determine in any particular case which valuation date the courts will choose. It is also difficult to state whether the valuation date has much significance in the end result. One court might value assets at the time of separation and divide property equally. Another court, in similar circumstances, might value assets at the time of hearing and divide property unequally. The actual result in each case may be similar, notwithstanding the different approaches adopted.

Legislation might compel the adoption of a particular valuation date. It is not really important whether that date is set as the time of hearing, the occurrence of a triggering event, separation, or defined as the time when one spouse ceases to contribute to family assets. What is important is the considerations the court then takes into account when deciding an appropriate division. A simple approach might be that a spouse is entitled to a share in property determined as of the date that the spouse ceased to contribute to family assets or the family unit, plus profit associated with that portion to the date of trial. Alternatively, entitlement could be determined at that time, and interest awarded on the value of the share to the date of trial. Similarly, the date of trial could be selected as the valuation date the courts must use, with a discretion to consider increases in value attributable to one spouse's continuing contributions.

While the courts vary on which valuation date should be adopted, they are taking these considerations into account. It is difficult to see whether a legislatively defined procedure would achieve different results. It would, at least, achieve certainty in procedure, and permit case law to develop in a more orderly fashion than at present. It would also settle the issue so that it is not endlessly litigated.

²⁷ *Simpkins*, *supra*, n. 20; *Baird*, *supra*, n. 6; *MacDonald v. MacDonald*, (1981) 27 B.C.L.R. 247 (S.C.).

²⁸ *Vance v. Vance*, (1981) 23 R.F.L. (2d) 397 (B.C.S.C.); *McDougall v. McDougall*, (1982) 29 R.F.L. (2d) 274 (B.C.S.C.); *Mayuk v. Mayuk*, (1981) 25 B.C.L.R. 57 (S.C.).

²⁹ *Grange*, *supra*, n. 2; *Houle v. Houle*, (1981) 28 B.C.L.R. 1 (S.C.).

³⁰ *Gretzel*, *supra*, n. 14; cf. *Chan v. Tsang*, (1982) 27 R.F.L. (2d) 187 (B.C.C.A.).

³¹ (1982) 33 B.C.L.R. 280, 27 R.F.L. (2d) 80 (S.C.).

A. Introduction

Section 43 of the *Family Relations Act* provides that each spouse "is entitled to an interest in family assets when a separation agreement is made or the court makes (i) a declaratory judgment under section 44, (ii) an order for dissolution of marriage¹ or judicial separation, or (iii) an order declaring the marriage null and void. Any one of these events evidences marriage breakdown. They are referred to as "triggering events" since they trigger entitlement to family assets.²

The use of the word "entitled" is needlessly ambiguous. Is a spouse entitled to an interest in family assets in the sense that ownership vests on the occurrence of a triggering event? Or is the spouse entitled in the sense that the court may make an order vesting ownership, depending on the circumstances.

In most cases, this issue is probably of little significance. The issue, however, becomes important in three cases: when one spouse dies before the court has determined entitlement to family assets; when third party interests are involved; and when one spouse is insolvent.

B. Death of a Spouse**1. GENERALLY**

In the absence of a triggering event, the *Family Relations Act* has no effect on rights to property. When one spouse dies, his or her property will pass under will or on an intestacy. The courts may vary a will under the *Wills Variation Act* if it makes inadequate provision for the deceased's spouse and children.

The effect that the death of one spouse has on the court's power to vary a post-nuptial settlement under section 5 of the *English Divorce and Matrimonial Causes Act*, 1859, the predecessor to section 54, was considered in 1898 in *Thomson v. Thomson and Rodschinka*.³ The petitioner brought an application to vary a marriage settlement after obtaining a decree absolute of divorce, but died before the hearing. It was held that the court's power was limited to making alterations for the personal benefit of the husband, wife or children of the marriage. The proceedings could not be continued by the deceased's personal representatives for the benefit of his estate.

In a number of cases, surviving spouses have attempted to use the *Family Relations Act* instead of the *Wills Variation Act* in order to obtain a fair share of the deceased's estate. In *Hurst v. Benson*,⁴ *Johal v. Johal*,⁵ *Momot v. Momot*,⁶ and *Ginter v. Ginter*⁷ the surviving spouse applied for a declaration that the

¹ There is some doubt whether "order for dissolution of marriage" refers to the decree nisi or absolute of divorce: see *Pearce v. Pearce*, (1974) 18 R.F.L. 302 (B.C.S.C.); *Roney v. Roney*, (1981) 31 B.C.L.R. 121, 24 R.F.L. (2d) 315 (S.C.); *Re Kindl*, (1982) 140 D.L.R. (3d) 92 (Ont. H.C.); *Mayuk v. Mayuk*, (1981) 25 B.C.L.R. 57 (S.C.). Usually the courts adopt the decree nisi as the triggering event: *Vedovato v. Vedovato*, (1981) 32 B.C.L.R. 360, 25 R.F.L. (2d) 297 (C.A.); *Carr v. Carr*, (1982) 30 R.F.L. (2d) 63 (B.C.S.C.); *Martelli v. Martelli*, (1982) 33 B.C.L.R. 145, 26 R.F.L. (2d) 1 (C.A.).

² Where the parties entered into a separation agreement before the *Family Relations Act* came into force, the triggering event is the first event to occur after the Act came into force: *Fischer v. Fischer*, [1984] B.C.D. Civ. 1680-04 (S.C.); *Sievens v. Sievens*, (1982) 41 B.C.L.R. 51, 31 R.F.L. (2d) 90 (C.A.).

³ [1896] P. 263, 65 L.J.P. 80, 74 L.T. 801 (C.A.).

⁴ (1981) 9 E.T.R. 274 (B.C.S.C.) see also *Kiss v. Palachik*, (1981) 34 O.R. (2d) 484 (Ont. C.A.).

⁵ (1981) 34 B.C.L.R. 391, 26 R.F.L. 453 (S.C.).

⁶ (1983) 34 R.F.L. (2d) 245 (B.C.S.C.); cf. *Harrison v. Harrison*, (1982) 38 B.C.L.R. 256, 29 R.F.L. (2d) 10 (S.C.).

⁷ [1984] B.C.D. Civ. 1674-03 (S.C.).

spouses had no reasonable prospect of reconciliation with each other, under section 44 of the *Family Relations Act*. A declaration under section 44 is a triggering event under section 43.⁸

In each case, it was held that the court had no jurisdiction to make a declaration under section 44 after the death of a spouse. An interest in family assets did not vest since there was no triggering event. In *Hurst v. Benson*,⁹ the surviving spouse subsequently received a share of the deceased spouse's estate under the *Wills Variation Act*.

The *Wills Variation Act* will always be available to assist the surviving spouse. It is not helpful, however, where the non-owning spouse dies. In that case, the beneficiaries of the deceased spouse are unable to share in family assets, notwithstanding that the deceased spouse would have been entitled to an interest in that property had he or she survived.

If a triggering event takes place before the death of a spouse, however, the courts will enforce the deceased spouse's entitlement to family assets. In *Fong v. Fong*,¹⁰ the wife died after a section 44 declaration that the spouses had no reasonable prospect of reconciliation, but before the hearing to divide family assets. It was held that the deceased person's cause of action did not abate by her death. The declaration "triggered" the vesting of a half interest in family assets as a tenant-in-common. Her interest passed to her estate.¹¹

2. OTHER JURISDICTIONS

All of the Canadian common law provinces have enacted similar legislation with respect to matrimonial property. Only a few jurisdictions, however, have specifically dealt with the problems that arise upon the death of one of the spouses. The Ontario *Family Law Reform Act*¹² provides that the surviving spouse may not commence or continue an action for a share of family assets

⁸ Section 44 appears to have been enacted for the purpose of giving the court jurisdiction to apportion assets and award maintenance and custody in those cases where there are no grounds for divorce or where the parties do not wish to seek a divorce. It has proved to be a useful section. In *Bidniak v. Bidniak*, (1979) 10 F.L.D. 140 (B.C.S.C.), Fawcus J. held that the word "may" in section 44 gives the court the discretion not to make a declaratory order even where there is no possibility of reconciliation. There has been no case in which the court has declined to exercise its jurisdiction to grant a declaration in those circumstances. It is conceivable that a court can find that reconciliation is reasonably possible where only one spouse believes that it is not possible, or where only one spouse gives evidence. The test for deciding whether there is a reasonable possibility of reconciliation appears to be objective and not subjective; see *Robertshaw v. Robertshaw*, (1979) 12 B.C.L.R. 102 (S.C.); *Fong v. Fong*, (1981) 30 B.C.L.R. 13, *aff'd* (1981) 33 B.C.L.R. 11, 25 R.F.L. (2d) 123 (C.A.), where the wife was dying of cancer and the husband was out of the country and had not been personally served. He could not be reached by his counsel. This circumstance was held to be sufficient evidence of irreconcilability; see also *Wolfram v. Wolfram*, (1980) 21 R.F.L. (2d) 335 (B.C.S.C.) concerning evidence that the marriage is at an end. The only case where the defence to a section 44 application was analyzed was *Papineau v. Papineau*, (1981) 31 B.C.L.R. 363, 24 R.F.L. (2d) 375 (S.C.). There the court concluded that the parties were seriously incompatible, and that the unfair conduct of the husband led to the conclusion that hope of reconciliation did not reach the level of a reasonable prospect. There have been several cases in which a divorce application based on a "fault" ground such as cruelty was dismissed, but a section 44 declaration was made: *Dixon v. Dixon*, (1982) 37 B.C.L.R. 292 (S.C.); *Papineau, ibid.* One case causes some analytical problems. In *Harrison v. Harrison*, (1982) 29 R.F.L. 10 (B.C.S.C.), a divorced woman brought an application for a section 44 declaration within two years after the divorce. The husband had died since the divorce. It was held that the wife continued to be a "spouse" within the meaning of section 1 of the Act. The dead husband also continued to be a spouse under the Act. The application was granted.

⁹ [1983] B.C.D. Civ. 4223-04 (C.A.).

¹⁰ (1982) 34 B.C.L.R. 50, 25 R.F.L. (2d) 277, *per* Anderson J. (B.C.S.C.); *cf. Maroukis v. Maroukis*, (1981) 24 R.F.L. (2d) 113, 125 D.L.R. (3d) 718 (Ont. C.A.) *aff'd* (1984) 41 R.F.L. (2d) 113 (S.C.C.); no rights arise under the Ontario *Family Law Reform Act* until court order.

¹¹ The husband appealed the court's declaration that there was no prospect of reconciliation on the ground that the court had no jurisdiction to make that declaration on the application of one spouse alone. That appeal was dismissed: *Fong v. Fong*, (1982) 33 B.C.L.R. 11, 25 R.F.L. (2d) 123 (C.A.). Notwithstanding the wife's death, her estate was entitled to an equal share of family assets: *Fong v. Fong*, (1982) 28 R.F.L. (2d) 349 (B.C.S.C.); see also *Johal, supra*, n. 5; *Ginter, supra*, n. 7; *Momot, supra*, n. 6.

¹² R.S.O. 1980, c. 152, s. 4(1), (3); with respect to the effect of the death of one spouse on rights to family property, see A.J. McClean, "Matrimonial Property - Canadian Common Law Style," (1981) 31 U. Toronto L.J. 363; Basil D. Stapleton, "Death and Property Rights in New Brunswick - Recent Developments," (1981) 30 U.N.B. L.J. 198; A.H. Osterhoff, "The Effect of Death on Familial Obligations," (1981) 23 R.F.L. (2d) 272; Alistair Bissett-Johnson, "Death And The Matrimonial Property Act," (1982) 25 R.F.L. (2d) 182; *Fraser v. Vincow*, (1982) 25 R.F.L. (2d) 171 (N.S.S.C.); *Re Levy*, (1982) 25 R.F.L. (2d) 149 (N.S.S.C.).

against the estate of the deceased spouse.¹³ Conversely, both New Brunswick¹⁴ and Saskatchewan¹⁵ provide that an application for a matrimonial property order may be commenced or continued by the surviving spouse or continued by the personal representative of a deceased spouse. These statutes also provide that death is a triggering event for the purpose of permitting the spouse to apply for an equal share in matrimonial property. They do not, however, cause property to vest in the surviving spouse.

In two recent cases, the effect of the Saskatchewan Act has been considered. In *Bugoy v. Bugoy*,¹⁶ the wife applied for distribution of matrimonial property. She died before the application was heard. Her personal representative continued the action on behalf of her estate. The court found that because the wife had altered her will to leave everything to a friend, her death constituted an extraordinary circumstance which justified dividing the matrimonial property unequally.

The court said:¹⁷

In these circumstances, the application, which was, while the wife was [alive], a disagreeable marital dispute, has become, on her death and on the continuation of her application by an interested personal representative, a bitter and corrosive feud made all the more so since what is at stake is a modest family farm created by this couple with the help of their only son through thirty years of considerable industry and self denial.

The court concluded:¹⁸

Is there any "extraordinary circumstance" here to be taken into account which may justify an order for other than an equal distribution, if for one or more of the reasons I have mentioned I was satisfied it was unfair or inequitable to do so? I believe there is. Mrs. Bugoy's death at age 46 has served to alter radically the issue as respects the matrimonial home. And that is, in my opinion, an extraordinary circumstance within the meaning of the Act. By reason of her death and the will she left, were I to order an equal division of the matrimonial home or its value half of it would go to strangers or others who have no need of it, have contributed nothing to it and would be depriving the respondent of what he worked for 30 years to build with the assistance of his father, his sister and his brother-in-law.

The wife's estate received a payment of \$10,000. The remaining matrimonial property, valued at \$120,000, was vested in the husband.

In *Smith v. Smith*¹⁹ the applicant widow applied for a division of matrimonial property under both the Saskatchewan *Matrimonial Property Act* and *Dependants' Relief Act*. The applicant and the deceased had been happily married until the deceased's death. The deceased, by will, gave his wife a life estate in all of his property. It was found that the applicant, at the deceased's urging, had full use of her separate estate during the course of the marriage. The court held that this was sufficient reason to divide the estate unequally. The wife was granted a one-half interest in the matrimonial home. As to the remaining property, the wife was awarded only the income from it for her life. Apart from the half-interest in the matrimonial home, the court found that the wife's entitlement under the Saskatchewan *Matrimonial Property Act* was exactly what it would have been had she relied upon the deceased's will.

¹³ See *Re Nevile and Beckstead*, (1979) 27 O.R. (2d) 59 (Ct. Ct.); there is, however, some doubt on whether the Ontario *Family Law Reform Act* has any application on the death of one of the spouses: see *Christo v. Bevan*, (1982) 36 O.R. (2d) 797 (H.C.).

¹⁴ *Matrimonial Property Act*, S.N.B. 1980, c. M-1.1.

¹⁵ *Matrimonial Property Act*, S.S. 1979, c. M-6.1.

¹⁶ [1981] 4 W.W.R. 136 (Sask. Q.B.). This decision was approved by the Saskatchewan Court of Appeal (that decision does not appear to have been reported). It was subsequently reversed by the Supreme Court of Canada (unreported at the time of publication of this Study Paper).

¹⁷ *Ibid.*, at 137.

¹⁸ *Ibid.*, at 141.

¹⁹ (1981) 21 R.F.L. (2d) 429 (Sask. Q.B.); see also *Watt v. Watt*, (1982) 11 E.T.R. 132 (Sask. Q.B.).

It would appear that the effect of Saskatchewan legislation respecting succession and family property is to create an overlapping system of rights, which, although analytically designed to perform different functions, are, in their application, subject to similar tests. In an annotation to this case, Professor James G. McLeod observes:²⁰

Although the decision is reasonable in the circumstances, analytically, it would have been more satisfying if the court had dealt with the property issue more precisely. According to the Act (s. 21(2)(l)) the court had to refer to the will. The preferable approach would have been to decide whether a deviation from the equal sharing was required under s. 21. It appears from the reasons it was. Then a decision as to the appropriate property rights could have been made and the succession rights added. In substance, the decision denies any interest in the assets given an 18-year marriage since the wife is left with her succession rights only. It is unfortunate that the reason why no property rights were given was not more clearly spelled out to assist future courts.

At a more fundamental level, the difficulty may arise because the legislation regarding sharing may be invoked after death. The difficulty could have been avoided if the sharing rules were restricted to the life of the payor, and any subsequent claims left for solution under succession law, including dependants' relief legislation.

3. THEORY

Professor McLeod suggests that difficulties arise from a failure to distinguish adequately between rights to succession and rights to family property.²¹ It is doubtful, however, that a spouse who would have possessed rights to family property, had the other spouse survived, should have to forgo these rights and rely upon his or her entitlement under succession simply because of the death of the other spouse. In most succession cases, the surviving spouse would probably be entitled to a generous share of the estate, quite apart from considerations of proprietary rights created during the marriage. In the event of a marital break-up, the surviving spouse should be entitled to a fair, not necessarily generous, share of the estate. While the *Family Relations Act* does direct the courts to consider matters of fairness and equity, by and large this entitlement is probably based upon proprietary rights flowing from direct or indirect spousal contributions to the family and to the acquisition of property. Rights under succession legislation and under family property legislation differ in both the functions they are to serve and the guidelines and tests to be observed when granting or enforcing them.²²

The rights of a separated or former spouse, who is barred from taking on succession, should continue against the estate of the deceased spouse. This may be accomplished in one of two ways:

- (i) by clarifying that rights to family property under the *Family Relations Act* are proprietary, or
- (ii) by providing that personal rights to family property arising under the *Family Relations Act* continue after the death of one spouse.

²⁰ *Ibid.*, at 430. see also *Kiss v. Palachik*, (1981) 34 O.R. (2d) 484, 24 R.F.L. (2d) 337, 10 E.T.R. 217 (Ont. C.A.), *aff'd*, (1983) 146 D.L.R. (3d) 385 (S.C.C.). The basis of the trial judge's decision, entitlement to family assets, was overruled by the Ont. C.A., but the result was affirmed relying on dependant's relief legislation as well as a constructive trust; in *Watt v. Watt*, *ibid.*, the wife was entitled to a half share in family assets under *Matrimonial Property Act* and the remainder of the estate under the *Dependants' Relief Act*.

²¹ More recently, the Saskatchewan courts have made greater efforts to distinguish between rights to succession and rights to family property: see *Re Serdula*, (1983) 34 R.F.L. (2d) 183 (Sask. Q.B.); cf. *Re Spencer and Spencer*, (1985) 32 A.C.W.S. (2d) 408 (Sask. C.A.), where the widow received the whole of her husband's estate under family property legislation. The Court held, consequently, that there was no need to refer to dependant's relief legislation.

²² *Richards v. Person*, (1982) 34 B.C.L.R. 350, [1982] 2 W.W.R. 668, at 671 (S.C.) in which the court noted that it was vested with a broad discretion and with a duty "... always to seek guidance by reference to contemporary custom, and particularly to those rules which the community has adopted as part of the statute law." The *Family Relations Act* principles with respect to matrimonial property were used as a guide to the appropriate distribution of the estate; this *dicta* was disapproved of by the British Columbia Court of Appeal on appeal (1983) 49 B.C.L.R. 43 (C.A.).

It would appear that the legislature was reluctant to state that rights to family property under the *Family Relations Act* are proprietary in nature. If actual proprietary rights vest on marital break-up, this could have profound effects, rendering title uncertain and conceivably having the potential of prejudicing third party interests. The most that can be said is that these rights resemble or are akin to proprietary rights. The courts, in some circumstances, will treat them as vested, and in others, as inchoate rights that may be varied or vested as may be appropriate in the circumstances. Probably, when rights to family property under the *Family Relations Act* have arisen during the joint lifetime of the spouses, the death of one spouse should be immaterial. The surviving spouse or the personal representative of the deceased spouse should be able to commence or continue any action under the *Family Relations Act*, which could have been brought had the deceased spouse survived, to enforce rights to property granted under that statute, or to vary those rights, as may be appropriate in the circumstances of the case.

Amending the *Family Relations Act* to provide or to confirm that an application respecting rights to family property may be made or continued by the surviving spouse after the death of the other spouse, or by the personal representative of the deceased spouse, would preserve the standing of both the surviving spouse and of the personal representative. In other provinces, which extend the ambit of matrimonial property legislation to circumstances when one spouse has predeceased the other, the rights of a personal representative are restricted to continuing an application. The Saskatchewan legislation provides, for example:²³

30. (1) An application for a matrimonial property order may be made or continued by a surviving spouse after the death of the other spouse or may be continued by the personal representative of the deceased spouse.

There are two possible explanations for this restriction. First, the Saskatchewan Act does not distinguish between an application by a separated or former spouse and an application by a surviving spouse whose marriage has been ended by the death of the other spouse. Second, the Saskatchewan Act does not distinguish between the tests to be applied when determining rights to succession or rights to family property. As a result, Saskatchewan courts appear to apply the same principles to an action respecting succession rights that they would to one respecting rights to family property. In the *Bugoy* case mentioned earlier, the death of the applicant before the hearing was regarded by the court as an extraordinary circumstance which permitted it to make an order quite different from the one it would have made had the applicant survived.

The death of a spouse should make no real difference to entitlement to family property. In many respects, the *Family Relations Act* is designed to replace common law principles for determining rights to property between spouses. However, at common law, if a deceased spouse were entitled to a resulting trust in family property, the personal representative of the deceased spouse would be able to commence or continue an action respecting those equitable proprietary rights, and the entitlement of the estate of the deceased spouse would not be extinguished. A spouse who contributed to the purchase of an asset was entitled to a resulting or constructive trust. One who had only looked after the family was not entitled to a resulting or constructive trust. The *Family Relations Act* provisions respecting rights to family property were

²³ *Supra*, n. 15, s. 30.

designed in part to remove the need to characterize the contributions made by each spouse. The *Family Relations Act* recognizes that an indirect contribution by a spouse of services to the family are as valuable as a direct monetary contribution to the purchase of family assets. Unless the courts have jurisdiction to apply the principles of the Act when one spouse dies, this unjust distinction between direct and indirect contributions drawn by the common law will continue.²⁴

Is it desirable or necessary to direct what principles the courts should apply when determining entitlement to family assets when one spouse has died? The approach of the Saskatchewan courts is arguably misguided, but cases will arise in circumstances which will be difficult to resolve. The *Bugoy* case was, without doubt, a "hard" case. It did not seem just to benefit the deceased spouse's heir at the expense of the surviving spouse. However, had the applicant spouse survived, or had the personal representative of the estate of the deceased spouse been able to pursue a proprietary right, the courts would have been obliged to divide family property more equally, even though the wife's will benefitted a friend. In terms of principle, therefore, it would seem that *Bugoy* was wrongly decided.²⁵

C. Debts and Bankruptcy

1. GENERALLY

During marriage, in addition to property, spouses will also frequently acquire debts and other liabilities. Often those debts and liabilities will be secured against family property or, if a creditor must commence execution proceedings, a judgment may be registered against real property or personal property may be attached in execution proceedings. As between creditors and the spouse owning property, the law provides rules for determining the priority of their interests. There is little guidance, however, on the priorities between a spouse with an interest in family assets under the *Family Relations Act* and others who have interests in those assets.

In Ontario, the *Family Law Reform Act* provides that entitlement to family property is personal.²⁶ Because the non-titled spouse's rights are personal and therefore claimed through the other spouse, a secured interest will have priority, even if the non-titled spouse contributed to the purchase of the encumbered asset. The secured creditor who did not have notice of the non-titled spouse's interest would have priority as a *bona fide* purchaser for value of a legal interest. Under the Ontario Act, the non-titled spouse claims

²⁴ "Constructive and Resulting Trust - Unjust Enrichment in a Common-Law Relationship - *Pettus v. Becker*", (1982) 16 U.B.C.L.R. 155; *Kiss, supra*, n. 20; *Willits v. Dixon*, (unreported Sask. Q.B. decision) (1981) 11 A.C.W.S. (2d) 219; cf. *Van de Mark v. Walton*, (1982) 34 O.R. (2d) 654 (Ont. H.C.) where it was held that placing the matrimonial home in the defendant's name alone constituted an outright gift, so that the plaintiff's claim under matrimonial property legislation, or a resulting or constructive trust could not succeed; cf. *Derryman v. Derryman*, [1984] B.C.D. 1642.2-02 (S.C.); matrimonial home was placed in names of parents of one spouse. It was held that the parents held the house pursuant to a resulting trust in favour of the spouses; *Sweetin v. Sweetin*, (1984) 39 R.F.L. (2d) 458 (B.C.C.A.); see also, *Maruda v. Maruda*, (1982) 24 R.F.L. (2d) 389 (Man. Q.B.). In *Vedovato v. Vedovato*, (1984) 39 R.F.L. (2d) 18 (B.C.S.C.) the petitioner was unable to bring an action under the *Family Relations Act*. The limitation period under the Act had elapsed. That did not prevent the petitioner from proceeding on a claim for an equitable interest in family assets pursuant to a constructive trust; see also *Baker v. Hall and Sun Life of Canada*, (1985) 44 R.F.L. (2d) 275 (Alta. C.A.).

²⁵ The above discussion was written before the appeal of the *Bugoy* case to the Supreme Court of Canada. At the time of printing, reasons for judgment were handed down but not available for comment in the text. The *Toronto Globe and Mail*, September 21, 1985 reports that the Supreme Court of Canada decided that the property must be equally divided. The death of one spouse does not alter entitlement under Saskatchewan family property legislation.

²⁶ R.S.O. 1980, c. 152, s. 4(2).

through the other spouse, and is subject to the priorities governing the property in the hands of the other spouse.²⁷

Moreover, the non-titled spouse has no interest in family assets until the court makes an order to that effect.²⁸ In *Re Mauro*,²⁹ a decision of the Ontario Supreme Court, the husband, while he resided with the wife, and while he was the registered owner of the home, was made the subject of an order in bankruptcy. After that order was made, the husband deserted the home. The receiver claimed the full interest in the home and attempted to oust the wife. It was held that the husband had no right to occupation of the home because the property had vested in the receiver, and since the wife's rights are not superior to those of the husband, the wife has no right to occupation either.³⁰

While Ontario law in this area is not free of difficulty, characterizing the non-owning spouse's interest as a personal right and providing that property rights depend upon court order offers more certainty than the law in British Columbia. In British Columbia, the nature of the spouse's interest is uncertain, and there is doubt when it arises.

2. AN EXAMPLE

An example is useful at this point to examine some of the questions that might arise.

A and B marry in 1970. Each contributes \$10,000 to the purchase of a house, which is placed in A's name. A mortgage is registered against the property. In 1975, A borrows \$10,000 for business purposes. The loan is unsecured. In 1978, A borrows another \$10,000 for business purposes. That loan is also unsecured. In 1980, A has severe financial problems. The loans and the mortgage go into default. Foreclosure proceedings are commenced. Judgment on the first loan is taken, and registered against the property. The spouses enter into a separation agreement, which is a triggering event. Judgment on the second loan is taken and registered against the property. A is petitioned into bankruptcy by other creditors.

The example is complicated. The issue is: what interest does the non-owning spouse have in the home. It is easiest to consider that question with respect to each creditor.

(a) *The Mortgagee*

The mortgagee has a secured interest which predates the triggering event. He will probably have priority over the non-titled spouse's interest under the *Family Relations Act*. The non-titled spouse can probably claim an interest in the property pursuant to a resulting trust based on the original contribution of \$10,000. That interest will not have priority over the mortgagee's security since the mortgagee acquired its interest as a *bona fide* purchaser for value. To avoid these problems, commercial lenders frequently

²⁷ This is the general principle in Ontario, although the law is not free of difficulty: in *Chalmers v. Copfer*, (1979) 7 R.F.L. (2d) 393 (Ont. Co. Ct.), judgment creditors were not able to execute against the matrimonial home because of the non-titled spouse's interest under section 42. Neither were they able to bring a court application on behalf of the debtor spouse to dispense with the need for such consent. In *Maritime Life v. Karapatakis*, (1979) 24 O.R. (2d) 311 (S.C.) a non-titled spouse was held to be a necessary party to a foreclosure action against the matrimonial home. However, in *Boom v. Shore*, (1979) 31 C.B.R. 26 (Ont. Co. Ct.), the wife's right to remain in the matrimonial home was found not to be a right which would bind the trustee in bankruptcy. It was purely a right *in personam* and not a right *in rem*, and did not come within the expanded definition of property in s. 2 of the *Bankruptcy Act*. The wife was a joint tenant and the trustee in bankruptcy was successful in his application for partition, following *Nat. Prov. Bank v. Ainsworth*, [1965] 2 All E.R. 472 (H.L.) which over-ruled *Bendall v. McWhirter*, [1952] 1 All E.R. 1307 (C.A.) which held that the right of a deserted wife to remain in the matrimonial home is binding on the trustee in bankruptcy. It was held that, since if the husband had not deserted the wife she would have had no rights, the distinction was unsound. Per Lord Hodson, 479: "... one must look to the wider 'equity' referred to by Denning, L.J., as justifying the decision. It being conceded that the 'equity' is not an equitable interest in the land, I find difficulty in seeing how it can operate so as to effect third parties." See also *Malhotra v. Malhotra*, (1983) 49 B.C.L.R. 8, 37 R.F.L. (2d) 310 (S.C.).

²⁸ (1981) 33 O.R. (2d) 661 (Ont. C.A.); see also *Royal Bank of Canada v. Nicholson*, (1981) 19 R.F.L. (2d) 84 (Ont. S.C.).

²⁹ (1983) 32 R.F.L. (2d) 362 (Ont. S.C.).

³⁰ The annotation to *Re Mauro*, *ibid.*, contains a useful overview of the "total confusion which seems to permeate" the Ontario law in this area.

require the non-titled spouse to be a party to the transaction, sometimes as guarantor and sometimes by way of a direct covenant.

(b) *The First Judgment*

The issue of priorities other than the mortgagee's will arise only if there is equity in the property. Assume that is so.

The first judgment was registered against the home before the non-titled spouse's interest under the *Family Relations Act* arose. For that reason, the judgment will probably have priority over the non-titled spouse's statutory interest.³¹

(c) *The Second Judgment*

The second judgment was registered against the home after the spouses entered into a separation agreement. That would suggest that the non-titled spouse's interest has priority over the second judgment. The problem is that authority is conflicting on when the non-titled spouse's interest arises. In *Rutherford v. Rutherford*,³² and in *Martelli v. Martelli*,³³ it was held that the interest of the non-owning spouse arises at the time of the triggering event and not at the time of the court order identifying and declaring assets to be divisible. In a number of cases, however, courts look to a period other than the date of the triggering event to determine interests in family property.³⁴

In terms of policy, it is doubtful whether the non-titled spouse should have priority on these facts. It would permit spouses to conspire to shield assets from creditors.³⁵ Moreover, it places third parties in a difficult position. One example will demonstrate the difficulties which third parties might face: Suppose a judge holds that an asset in the husband's name is a family asset. The trial is adjourned to give counsel time to present evidence of value. To escape the consequences of the decision, the husband sells the asset at a bargain price to third parties who are either innocent or know of the litigation but not of the results of the trial. The husband absconds with the money. What is the third party's position? Does it matter if the third party knew of the results of the trial? Does it matter if the third party was totally ignorant of the circumstances or buys the asset before the decision which vests the property in the wife. Problems of this kind were faced in *Farmer v. Farmer*,³⁶ and *Oscroft v. Oscroft*.³⁷

As a general rule, nothing prevents a spouse from dealing with his property as he sees fit. As a consequence, a court cannot interfere with a bona fide sale. Apparently, nothing prevents a sale of property to a person who is aware of the wife's claim to property, but pays fair market value for the asset. Section 52 of the Act may be helpful in such circumstances. Subsection 52(3) states:³⁸

Where the Supreme Court . . . is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order

³¹ *Maholtra, supra*, n. 27.

³² (1981) 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.).

³³ (1981) 22 B.C.L.R. 397, 26 R.F.L. (2d) 1 (S.C.).

³⁴ See Chapter VII, VALUATION.

³⁵ See, e.g., *Sheriff of Newfoundland v. Jefferton*, (1981) 25 R.F.L. (2d) 350 (Nfld. S.C.), where the technical point was irrelevant to the B.C. *Family Relations Act*, but the problems created by an undisclosed agreement are discussed; see also *Miller v. Miller*, (1984) 43 R.F.L. (2d) 289 (B.C.S.C.).

³⁶ (1979) 10 R.F.L. (2d) 243 (B.C.S.C.).

³⁷ [1982] B.C.D. Civ. 1664-01 (S.C.).

³⁸ Subsection 52(3) is very limited in scope. Where the transferee pays no consideration for the asset, the court has the jurisdiction to set aside the sale: *Oscroft, ibid.*

under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

In theory, a spouse can apply to prevent a sale of assets even while continuing to cohabit with the other spouse.

To a limited extent, the subsection appears to work. For example, in *Marineau v. Marineau*,³⁹ the wife encumbered the family home which was in her name. It was later held that she must account to the husband by conveying the home to the husband and by paying to him the amount in excess of her interest she received when she encumbered the home.

(d) *The Assignment in Bankruptcy*

The issue of priorities in the event of bankruptcy has been considered in a recent case. The decision reflects some of the problems posed by the uncertain nature of entitlement to family property under the *Family Relations Act*. In *Biedler v. Biedler*,⁴⁰ the parties separated in 1980. At the time of separation, the husband had equity in various assets valued at about \$2,000,000. In February 1981, a section 44 declaration that the spouses had no reasonable prospect of reconciliation was made. The court's order also restrained the husband from disposing of family assets pending a hearing to determine the proper division, but he disregarded it. By October 1982, the date of the second hearing, the value of the assets had been reduced to one-half million dollars and the debts against the property exceeded the equity. Prior to the second hearing the husband made an assignment in bankruptcy.

It was held that the wife's interest in the property arose when the section 44 order was made and that she was therefore entitled to an accounting of the assets which had been squandered by the husband since the first hearing. The valuation date was also fixed by the court to be the date of the section 44 order.

The interest of the trustee in bankruptcy was also considered. It was held that since the section 44 order was made prior to bankruptcy, the wife's undivided one-half interest as a tenant in common vested prior to bankruptcy. The wife was entitled to one-half of the assets as they existed at the date of the section 44 order. The court did not decide whether the wife was entitled to these assets free of the husband's debts incurred before or after the section 44 order, or of debts secured by the property.

Section 51 could not be applied against the interest held by the trustee in bankruptcy. In effect, the *Biedler* decision means that a spouse who would otherwise be entitled to a redistribution under section 51 loses all benefit of that section upon the bankruptcy of the other spouse, even if the bankruptcy occurs after a section 44 order has been made.

3. FRAUDULENT CONVEYANCES

Spouses may be able to protect some assets from execution by creditors by entering into a separation agreement. This tactic would have the advantage of keeping the property "in the family" and at the same time would be more likely to escape the provisions of the *Fraudulent Conveyances Act* than a simple transfer.⁴¹ One way to prevent this kind of fraud would be to place the onus on the grantor to disprove fraudulent intent.⁴² This solution may be

³⁹ [1984] B.C.D. Civ. 1647-03 (S.C.).

⁴⁰ (1983) 33 R.F.L. 366 (B.C.S.C.); see also *Ford v. Ford*, [1985] B.C.D. Civ. 1639-01 (S.C.); *Walters v. Walters*, [1985] B.C.D. Civ. 1603-01 (S.C.); *Canadian Imperial Bank of Commerce v. Croteau*, (unreported Ontario H.C. decision noted at October 4, 1985 Ontario Lawyers Weekly, p. 2), where the wife was given priority in the bankruptcy of her husband on the basis of a resulting trust in family assets.

⁴¹ *Re Bankruptcy of Nadeau*, [1980] B.C.D. Civ. 546-04 (S.C.); *Bank of Nova Scotia v. Sedlacek*, (1982) 40 B.C.L.R. 306 (S.C.); *Canadian Imperial Bank of Commerce v. Shapiro*, (1985) 49 O.R. (2d) 333 (Ont. S.C.).

⁴² See, e.g., *Bank of Montreal v. Jory*, (1981) 39 C.B.R. (N.S.) 30 (B.C.S.C.).

unsatisfactory because it imposes a heavy onus upon all grantors and invites litigation against the vast majority of spouses who may have no fraudulent intent.

D. Obligations of the Owning Spouse

1. RESPONSIBILITY FOR LOSSES

Some time may elapse between a triggering event, and the final division of family assets. During that time, one spouse may have possession of the family assets, and their value may change due to economic circumstances, or the spouse's actions.

If the non-owning spouse acquires a beneficial interest in family assets when a triggering event takes place, the owning spouse would become a trustee of the non-owning spouse's interest. As a trustee, the law would impose obligations on him with respect to the proper care and investment of assets. He would be required to account both for profits earned by use of the assets, and for losses due to breach of his fiduciary obligations. The courts, however, do not adopt this analysis.

Some cases suggest that courts distinguish between losses deliberately incurred and losses arising from economic circumstances. In *Farmer v. Farmer*,⁴³ the husband had deliberately dissipated assets. The court chose the date of separation to value assets. In *Paulson v. Paulson*,⁴⁴ the court redistributed the property of the husband in favour of the wife because the husband wasted the assets after the separation and before the trial. In *Simpkins v. Simpkins*,⁴⁵ however, a reduction in the value of family assets occurred through no fault of the owning spouse. It was held that the valuation date was the date of the trial.

In *Jaekel v. Jaekel*,⁴⁶ the husband continued to operate the family's farm after the separation. He made some decisions with respect to expansion of the farm which, due to economic circumstances, had disastrous consequences. He did not "waste" assets in a vindictive or deliberate sense. The court nonetheless held that the husband alone must bear the losses:⁴⁷

[H]e continued the business on his own account and must be held responsible for the losses which subsequently occurred. . . . [T]he debts after incurred for operating expenses after separation are those of the husband. He chose to carry on the business.

The same issue was resolved in a slightly different way in Saskatchewan in *Wilson v. Wilson*.⁴⁸ After the husband had dissipated assets, all that was left was the matrimonial home with an equity of about \$20,000. The court held that it was unfair to order an equal division of family assets and the matrimonial home was awarded to the wife alone. The husband was also ordered to pay the wife further sums as compensation for wasting her assets. Normally, where the owning spouse encumbers property later adjudged to be a family asset, the position of the non-owning spouse is seriously compromised, since the rights of creditors to foreclose are not affected by any dealings between the spouses. Section 52 cannot help the non-owning spouse as against the creditor. As between the spouses, however, it was held in *Wagner v. Wagner*⁴⁹ that

⁴³ *Supra*, n. 36.

⁴⁴ [1984] B.C.D. Civ. 1645-03 (S.C.).

⁴⁵ (1981) 30 B.C.L.R. 340, [1981] 5 W.W.R. 598 (S.C.).

⁴⁶ (1983) 34 R.F.L. (2d) 202 (B.C.S.C.).

⁴⁷ *Ibid.*, at 203-04. See also *Guthrie v. Guthrie*, (1983) 34 R.F.L. (2d) 50 (Man. Q.B.).

⁴⁸ (1981) 19 R.F.L. (2d) 321 (Sask. Q.B.).

⁴⁹ (1982) 36 B.C.L.R. 68 (S.C.).

an improper motive in giving away assets can result in a redistribution under subsection 52(3) and that the absence of an improper motive does not preclude an order for compensation under subsection 52(2)(c).

In Manitoba, the husband has a duty to protect the wife's "interest" in family property after separation:⁵⁰

The imperative terms of the Act put each spouse on notice of the statutory obligations flowing from the separation and until the issues under the Act are resolved, the spouse controlling, using or holding a shareable asset owes to the other spouse a fiduciary duty to ascertain and secure or preserve the share of that other spouse.

The non-owning spouse has no interest in family assets, until a triggering event has occurred. The law offers the non-owning spouse little by way of protection of his or her interests. In *de Verteuil v. de Verteuil*,⁵¹ for example, the husband sold the matrimonial home which was registered in his name, after the parties separated. He invested the proceeds and lost everything. It was held that the triggering event was the trial date and that the interest of the wife arose on the date of trial. On that date there was no asset left to which a right could attach.⁵²

In *McEwan v. McEwan*,⁵³ the husband invested family assets badly, but not recklessly. It was held that he was not liable for the diminished value of the assets. The wife submitted that because of the fall in the value of the assets since separation, the valuation date should be the date of separation. The court, however, ordered that the valuation date be the date of trial.

2. MANAGEMENT AND CONTROL

The undefined nature of the non-owning spouse's interest in family assets under the *Family Relations Act* has inevitably led to some confusion. The duty the owning spouse owes to the non-owning spouse is unclear. The distinction between losses arising from decisions which are reckless or designed to prejudice the non-owning spouse and those arising from economic circumstances drawn by the courts seems, on the whole, to be a sensible one. Whether it is justified by the provisions of the *Family Relations Act* is by no means certain, and one may expect inconsistencies in authority on these issues to continue.

The provisions of the *Family Relations Act* do not directly affect the rights spouses may exercise with respect to their separate property until marriage breakdown. Courts, however, have held that the non-owning spouse has by necessary implication some sort of interest in the owning spouse's property before marriage breakdown, largely in order to prevent the owning spouse from dealing with his property in a way that will prejudice the non-owning spouse's eventual rights under the *Family Relations Act*.

On marriage breakdown, the non-owning spouse becomes entitled to a half interest in family assets as a tenant in common. The consequences of this interest are uncertain, but appear to vest a proprietary interest in the non-owning spouse. Even after this interest arises, it would seem that the non-owning spouse should have no claim for losses arising from economic circumstances. This proposition may not hold true, however, where the non-owning spouse objects to the owning spouse's decisions which lead to loss. It is clear that spouses have the exclusive right to manage and control their

⁵⁰ *Supra*, n. 47, at 53.

⁵¹ [1981] B.C.D. Civ. 1647-03 (S.C.).

⁵² There was no suggestion in *de Verteuil*, *ibid.* of malfeasance by the husband; see also *Bollhurst v. Bollhurst*, (1985) 44 R.F.L. (2d) 296 (B.C.S.C.), where losses arising from the husband's financial recklessness were shared equally, just as profits would have been equally shared.

⁵³ (1983) 34 R.F.L. (2d) 93 (B.C.S.C.). See also Chapter VII, Section 52.

separate property before marriage breakdown. The provisions of the *Family Relations Act* leave in doubt, however, who is entitled to management and control of family assets after a triggering event occurs.

These issues can be clarified by amendments to the *Family Relations Act*. One approach would be to provide that the spouses have exclusive rights to manage and control their separate property until the property is actually divided between the spouses, by agreement or court order. Rights of management and control, however, should be subject to a duty to compensate the non-owning spouse for losses arising from decisions which are reckless or designed to prejudice the non-owning spouse.

A. Introduction

The *Family Relations Act* is silent on the significance of the spouses' conduct during the marriage. In some cases, it has been held that conduct is irrelevant to the determination of an appropriate division of family property:¹

... the *Family Relations Act*, by its eloquent silence on the subject, plainly excludes guilt, fault or blame as a factor relevant to apportionment of assets.

In other cases, conduct has clearly been taken into account.

In an area of law as complex and intertwined as matrimonial law, the conduct of the parties before, during and after cohabitation often cannot be ignored. As a matter of law, for example, conduct is relevant to considerations of maintenance.² Applications for maintenance have been refused on the ground that the wife deserted the family and that she intended in the future to apply for a share of the family assets.³ Entitlement to use and occupation rent by a non-residing spouse is almost entirely dependent on whether the non-residing spouse deserted or was ousted from the home.⁴ In many cases the quantum of reapportionment appears to depend on findings of fact respecting conduct.

In *Day v. Day*,⁵ the parties cohabited from 1957 to 1974. The trial was held in 1981. After the separation, the husband paid no monies towards the expenses of the wife or the children. The wife had been solely responsible for the preservation of the home. The home had appreciated in value since separation. The husband had been a bad father and had even refused to pay for the wedding expenses of his daughter. He had lied to the court during the trial. The husband's interest in the home was fixed at \$100.

In *Arsens v. Arsens*,⁶ the marriage lasted for 5 years. The husband owned the home prior to the marriage. It was held, however, that since the wife was an innocent party in the break-up and in fact tried to preserve the marriage, it would not be unfair to give her the whole of the interest in the house so that she could buy a condominium.

In *Malhotra v. Malhotra*,⁷ the trial judge awarded the husband \$100 as his interest in the home after a 10 year marriage on the grounds that the husband had behaved badly, wasted money on legal fees, and refused to pay maintenance as ordered. The wife had also been the major contributor during the marriage. On appeal, the Court of Appeal increased the husband's share to 25%, less sums owing on arrears of maintenance.

In *McCann v. McCann*,⁸ the court was faced with a 3½ year cohabitation during which the wife, who had no assets of her own, helped in the husband's business. The husband was a very unpleasant fellow. Notwithstanding the

¹ *Worobieff v. Worobieff*, (1980) 19 B.C.L.R. 241 at 245, [1980] 4 W.W.R. 683, 109 D.L.R. (3d) 179 (S.C.). See also *Stammler v. Stammler*, (1979) 14 B.C.L.R. 57, 11 R.F.L. (2d) 83 (S.C.); *Zaurini v. Zaurini*, (1981) 33 B.C.L.R. 15, 123 D.L.R. (3d) 744, 22 R.F.L. (2d) 161 (C.A.); *Carpenter v. Carpenter*, [1983] B.C.D. Civ. 1645-13 (C.A.); *Houpa v. Houpa*, (1980) 20 B.C.L.R. 382, 17 R.F.L. (2d) 119 (S.C.); *Tranch v. Tranch*, (1981) 30 B.C.L.R. 98 (S.C.); *Fennings v. Fennings*, (1979) 17 B.C.L.R. 267, 12 R.F.L. (2d) 74 (S.C.); *Peters v. Peters*, (1980) 20 B.C.L.R. 93, 19 R.F.L. (2d) 217 (S.C.); *Gaion v. Gaion*, (1981) 29 B.C.L.R. 277 (S.C.).

² See, e.g., *Wolverson v. Wolverson*, [1981] B.C.D. Civ. 1614-03 (S.C.); *Turner v. Turner*, (1980) 20 B.C.L.R. 185, 25 R.F.L. (2d) 61 (S.C.); *Heaslop v. Heaslop*, [1981] B.C.D. Civ. 1621-01 (S.C.); *Schaller v. Schaller*, [1981] B.C.D. Civ. 1614-07 (S.C.).

³ *Schaller*, *ibid.*

⁴ *Sloan v. Sloan*, [1985] B.C.D. Civ. 1662-01 (S.C.). See also *Borman v. Borman*, [1983] B.C.D. Civ. 1662-01 (S.C.); *Puffrey v. Puffrey*, [1981] B.C.D. Civ. 1662-02 (S.C.); *Harmeling v. Harmeling*, (1980) 18 R.F.L. (2d) 97 (S.C.); *Pilski v. Pilski*, [1981] B.C.D. Civ. 1662-01 (S.C.).

⁵ (1981) 29 B.C.L.R. 363, 23 R.F.L. (2d) 93 (S.C.).

⁶ (1980) 25 B.C.L.R. 128 (S.C.).

⁷ (1983) 49 B.C.L.R. 8, 37 R.F.L. (2d) 310 (C.A.).

⁸ [1981] B.C.D. Civ. 1647-06 (S.C.).

short duration of the marriage, the wife was awarded 50% of the home specifically because the wife, in putting up with her husband, "certainly earned her share and is entitled to one-half."

In *Pacey v. Pacey*,⁹ the wife behaved very admirably. She suffered from a severe vision problem, but remained fully employed throughout the seven year marriage. The husband, on the other hand, deserted the wife sporadically and could not maintain steady employment. The home was purchased toward the end of the marriage. The wife contributed \$60,000 of money earned by her during the marriage and the husband contributed \$10,000. The equity in the home was \$105,000. The husband was awarded \$10,000, the amount contributed by him, to be paid by the wife in two years. Conduct was the central or only issue.

In *Christensen v. Christensen*,¹⁰ each spouse was awarded 50% of the home, but the wife's interest was calculated as of the date she commenced living with another man. In *Read v. Read*,¹¹ after a 4½ year marriage, the husband left to live with another woman. The court redistributed the home 70/30 in favour of the wife, in part because the wife had to suffer the hurt and humiliation of the separation.

The permutations seem endless. In *Hoyer v. Hoyer*,¹² Taylor J. noted that the wife because of alcoholism had made no effective contribution to the marriage. He also noted that the husband and the child required the home. He divested the wife of her interest in the home. The British Columbia Court of Appeal¹³ held that the wife was entitled to a half interest in the home, but since the husband and child also had needs, counsel for the parties should work out a proper solution.

Other courts refuse to consider conduct, even to the extent that the resulting decision contradicts many other decisions. For example, in *Timmins v. Timmins*,¹⁴ the marriage lasted 11 years. The wife owned the home before the marriage and was the major contributor during the marriage. She contended that, if she were given sole interest in the home, she would be solely liable for a \$20,000 mortgage obtained by the spouses to secure debts incurred during the marriage. She also said that she was ill and required the comfort that possession of a home affords. Mr. Justice Meredith held that the apparent assumption by the courts that the longer the marriage, the greater the entitlement, is unwarranted by the words of the Act, and that examination of the concept of "earning" an interest in the home amounts to an examination of the conduct of the parties which is not a criterion contemplated by section 51.

B. Theory

"Conduct" itself is not a particularly useful tool. The concept is too vague. Some consideration of discrete kinds of conduct is appropriate. It is convenient to divide this topic into conduct which affects the marital relationship, as it relates to the acquisition of property, and as it relates to the property arrangements the spouses have made. These categories can be respectively labelled as marital fault, contribution and intention.

⁹ [1981] B.C.D. Civ. 1654-17 (S.C.).

¹⁰ (1980) 19 R.F.L. 240 (S.C.).

¹¹ *Read v. Read*, [1983] B.C.D. Civ. 1645-12 (S.C.).

¹² (1981) 32 B.C.L.R. 41, 24 R.F.L. (2d) 444 (S.C.).

¹³ *Hoyer v. Hoyer*, (1982) 41 B.C.L.R. 27, 30 R.F.L. (2d) 261 (C.A.).

¹⁴ [1984] B.C.D. Civ. 1654-06 (S.C.), *rev'd* (1985) 32 A.C.W.S. (2d) 190 (B.C.C.A.).

1. MARITAL FAULT

One spouse might be primarily responsible for marriage breakdown, and his or her conduct morally blameworthy. Cruelty or adultery, for example, have long been recognized as grounds for divorce. Most courts, however, agree that fault for marriage breakdown has no impact on entitlement to family property.¹⁵ So far as entitlement depends upon contribution, fault for marriage breakdown has little significance. It is difficult to say, of course, whether individual judges are swayed by this factor, since the process of arriving at an appropriate division of property is seldom articulated. In *Maruda v. Maruda*,¹⁶ the husband's conduct was considered relevant to the issue of credibility. As a consequence, the husband was unable to meet the onus of proof necessary to establish that particular assets were not family assets.

2. CONTRIBUTION

Conduct as it relates to the acquisition of assets is often perceived to be significant. Spouses are *prima facie* entitled to an equal share of family assets. The Act is silent on whether entitlement to family assets derives from the spouses' contributions to the family unit or from the fact of marriage. Most courts appear to adopt the view that entitlement rests on each spouse contributing to the family unit to the best of his or her ability.¹⁷ A spouse who does not contribute according to that standard is not entitled to an equal share of family property.¹⁸ Where, for example, one spouse is an alcoholic or profligate, increasing the other spouse's responsibilities to the family unit, then it is likely family property will be divided unequally.

The cases are by no means clear on the significance the courts attach to conduct relating to contribution, and the application of this factor will continue to be uncertain so long as there is doubt whether entitlement to family property derives from contribution or from the fact of marriage.

3. INTENTION

The conduct of the spouses may evidence an intention to share all property or to retain separate estates.¹⁹ Conduct of this kind presents the courts with a number of problems, and the cases have not been consistent. This inconsistency is due in large measure to the uncertain status of agreements under the *Family Relations Act*. The tacit arrangements of spouses may be as clear as if they had entered into a formal agreement. Courts differ on the effect of a formal agreement on their jurisdiction to determine an appropriate division of property. A judge who believes that a formal agreement is binding unless it is unconscionable may well give great weight to evidence of conduct indicating a tacit spousal agreement about property. A judge who is prepared to vary a formal agreement in the absence of unconscionability is likely to disregard compelling evidence of intention to divide property in a certain way. There are cases, consequently, where the courts give effect to an intention to retain separate property, and others where the courts vary agreements formally recording the same intention.

¹⁵ *Supra*, n. 1.

¹⁶ (1984) 43 R.F.L. (2d) 26 (B.C.S.C.); see also *Wood v. Wood*, [1984] B.C.D. Civ. 1645-25 (S.C.); *Podmoreff v. Podmoreff*, [1984] B.C.D. Civ. 1645-30 (S.C.); *Eberts v. Eberts*, [1984] B.C.D. Civ. 1674-14 (S.C.);

¹⁷ See, e.g., *Stewart v. Stewart*, (1984) 56 B.C.L.R. 375 (C.A.); *Newson v. Newson*, (1984) 42 R.F.L. (2d) 278 (B.C.S.C.); *Bonke v. Bonke*, (1984) 42 R.F.L. (2d) 72 (B.C.S.C.); *Wangler v. Wangler*, [1984] B.C.D. Civ. 1654-10 (S.C.); *Derryman v. Derryman*, [1984] B.C.D. Civ. 1654-12 (S.C.); *Bawtinheimer v. Bawtinheimer*, (1984) 56 B.C.L.R. 25 (S.C.); cf. *Deane v. Cunningham*, [1985] B.C.D. Civ. 1654-01 (S.C.).

¹⁸ *Loray v. Loray*, [1984] B.C.D. Civ. 1676-09 (S.C.); see also *Tsonis v. Tsonis*, [1985] B.C.D. Civ. 1654-04 (S.C.).

¹⁹ See, e.g., *Schoenfeld v. Schoenfeld*, [1984] B.C.D. Civ. 1650-01 (S.C.).

It is possible to overstate the magnitude of this problem. Where spouses have roughly equal estates, their intention is unlikely to be significant, since an appropriate division will usually be equal shares. When their estates differ significantly, then intention is a dangerous tool. It risks restoring the former law, under which spouses were entitled to share in property where that was their common or mutual intention. That test was not particularly useful for determining an appropriate division of family property. Common intention was difficult to prove.

The test of intention arguably undermines the purpose of the *Family Relations Act*. For example, an income earner might apply part of his earnings to his family and part to his separate property which his family is not permitted to use. His intention is not to share his separate property. Another income earner might not be so careful in the application of his earnings. The test of intention would result in different divisions of family assets in these two cases. It is doubtful whether one spouse's unilateral intention should have that result. In fact, the courts' approach to intention may not result in different divisions of family assets. In *McDougall v. McDougall*,²⁰ the husband kept his estate separate. The court awarded the wife an interest in those assets because she had lived with the husband's parsimony.²¹ In *Jones v. Jones*,²² the court found that the husband's business efforts were solely aimed at financing his and his wife's retirement. All of his property, consequently, was held to be family assets.²³

Where the courts have used intention, it is usually to resolve a problem of dividing assets which are not clearly family assets. For example, the courts have given effect to an intention to share an inheritance or business assets. Where the property is clearly used for a family purpose, it is difficult to see how intention can override the property's characterization as a family asset. In *Bawtinheimer v. Bawtinheimer*,²⁴ for example, the spouses retained separate estates, but the wife was still entitled to an interest in the family home.

The courts would not need to resort to the test of intention if they had clearer guidelines on what property was susceptible to division between the spouses. If spousal agreements were binding (unless void at common law or by reason of unconscionability) spouses would be able to give effect to their mutual intentions in that way. Amendments to the *Family Relations Act* along these lines would generally remove the need for considering conduct evidencing intention.

4. SUMMARY

Case law on the significance of conduct is conflicting. Legislation might resolve conflicting authority. One approach would be to provide that fault for marriage breakdown or conduct evidencing intention concerning the division of family property are irrelevant considerations in a determination of an

²⁰ (1982) 29 R.F.L. (2d) 274 (B.C.S.C.); see also *Kropacek v. Kropacek*, (1982) 36 B.C.L.R. 296 (S.C.).

²¹ *Rafferty v. Rafferty*, (1984) 39 R.F.L. (2d) 374 (B.C.S.C.); where the wife was granted an interest in a secret investment on the theory that the investment probably limited disposable dollars available to the family. In *Justic v. Justic*, (1984) 40 R.F.L. (2d) 441 (B.C.S.C.), the husband carefully kept an inheritance and business investments separate from family property. These were not family assets. It was not a case of the wife's indirect contributions freeing up income for the purpose of investment.

²² [1982] B.C.D. Civ. 1640-09 (S.C.).

²³ See also *Eisner v. Eisner*, [1980] B.C.D. Civ. 1647-53 (S.C.). In *Johnson v. Johnson*, [1984] B.C.D. Civ. 1623-03 (S.C.) the husband concealed assets owned prior to marriage and these were held to be his separate property. Lack of knowledge of an asset, however, does not conclusively exclude it from being a family asset: *Nicolette v. Nicolette*, [1985] B.C.D. Civ. 1541-01 (S.C.). In *Watson v. Watson*, (1985) 40 R.F.L. (2d) 305 (B.C.S.C.) the spouses divided their property during the course of the marriage with a view to maintaining separate estates. Neither spouse was entitled to an interest in the other spouse's property.

²⁴ *Supra*, n. 17. Cf. *Raines v. Raines*, [1983] B.C.D. Civ. 1623-01.

appropriate division of family property. Legislation might also provide that conduct relating to contribution to the family unit is a relevant consideration in determining entitlement to family property. This last point, however, depends on whether the *Family Relations Act* is amended to provide that the basis of equal entitlement to family assets rests on spousal contributions to the family unit.

A. Introduction

This Study Paper is intended primarily to assess British Columbia law governing family property. The provisions of the *Family Relations Act* incorporate a broad judicial discretion. By what standard can a discretionary regime be assessed? The courts assert generous powers to vary a division of property as may be appropriate in the circumstances. It is difficult to say whether the result is fairness on a case by case basis. The ability to take into account the particular and most minute circumstances of a marriage to determine divisible property and an appropriate division of it gives the appearance of the law being tailored to the special needs of the spouses. That appearance is, we believe, false. Our review of case law under the *Family Relations Act* discloses little agreement among judges on most aspects of family law. In consequence, each judge's personal views on these issues have a disproportionate significance. Disputes concerning family property raise issues on which reasonable men will frequently disagree. A diversity of views is reflected in the decisions on the *Family Relations Act*. That is an undesirable result.

Even if judges were able to adopt a consistent view of the proper operation of family property legislation, there is doubt whether we can afford to retain a regime with as large an element of discretion as the current one. No opinion on the probable outcome of any case involving family property can be advanced with any degree of certainty. The law is unpredictable. Relying on discretion rather than a basic set of guidelines and rules to resolve disputes often discourages settlement and requires spouses to resort to litigation.

In the preceding chapters little attempt has been made to explore alternatives to the regime of family law adopted in British Columbia. The discussion has been intended to be more descriptive than analytic. The cases do not lend themselves to close analysis.

This chapter is intended to serve as an overview of the *Family Relations Act*, as well as a comparative study of approaches that might be adopted in British Columbia to resolve problems that arise in dividing family property.

B. The Need for Family Property Legislation

Before and during marriage, few spouses turn their minds to the consequences of marital breakdown. After the marriage has broken down, many spouses are unwilling or unable to deal with these consequences. The common law has limited tools at its disposal to remedy problems flowing from the neglect or unwillingness of spouses to determine in advance what their financial interests will be when the marriage relationship ends. Legislation is required to determine the rights and obligations when spouses fail to do so for themselves. In this respect, family property legislation serves a purpose analogous to that served by the intestate succession provisions of the *Estate Administration Act*.¹ Such legislation is enacted to transfer property fairly on death when a person fails to make a valid will disposing of all of his estate. Similarly, the *Family Relations Act* provides a *prima facie* disposition of the matrimonial estate in default of agreement.

¹ R.S.B.C. 1979 c. 114.

The *Family Relations Act*, however, goes further than merely providing for an appropriate division of property when the parties fail to do so for themselves. It permits the courts to review agreements dividing property and vary them if they are unfair. In this respect, the *Family Relations Act* is similar to the *Wills Variation Act*,² which permits the courts to review a will, and vary it if it does not make adequate provision for the deceased's immediate family.

The *Family Relations Act* and the *Wills Variation Act* differ in one important respect. The *Wills Variation Act* confers a jurisdiction on the courts to review unilateral acts. A testator may (and frequently does) make a will in secret. The provisions in a will are not subject to prior negotiation. Spousal agreements are made between two people, who often have legal advice, after full negotiation. A spouse need not sign an unfair agreement.

When parties freely enter into an agreement, there are very few reasons for releasing them from it, and many in favour of holding them to it. Agreements let people settle their disputes without litigation. Parties to the agreement and third parties can rely on it. The law should encourage people to negotiate their differences and arrive at reasonable compromises. It is of less significance that the terms of the agreement are seen by a judge to be unfair if the agreement itself was fairly obtained. Presumably, if the agreement is fairly obtained, the parties thought its terms fair at the time it was made. The current legislation misplaces the emphasis of the court's proper inquiry. The concern should be to ensure fairness in the process of reaching agreement rather than fairness in the terms of the agreement. Where the provisions of an agreement are demonstrably unfair to one party to it, it may be suspected that the agreement was unfairly obtained but the courts should not intervene unless that can be established. Any other approach prejudices parties who have bargained in good faith. They are unable to rely on their agreement if it can be challenged at any time.

Decisions under the *Family Relations Act* reflect inconsistent interpretations of the role to be performed by it. This is most readily apparent in decisions concerning the reviewability of spousal agreements. Authority conflicts on the circumstances justifying the variation of a spousal agreement. Some courts are prepared to vary spousal agreements on the basis that the agreement is improvident from the perspective of one spouse. Other courts are prepared to give effect to the tacit intentions of the spouses. These differing approaches can produce curious results. For example, formal agreements may be set aside, while highly informal and incomplete agreements may be enforced.

Legislation was necessary to provide a means of dividing family property on marriage breakdown when the spouses were unable to reach agreement on that issue. It follows that interference with spousal agreements should be a task not lightly undertaken. In *Working Paper on Spousal Agreements* (W.P. 51, 1985) the Law Reform Commission of British Columbia tentatively proposed amendments to the *Family Relations Act* that would permit review of spousal agreements only where the agreement was both substantially unfair and improperly or unfairly obtained. Legislation implementing these proposals would confirm that the primary function of family property legislation is to provide a means of dividing property when the spouses are unable to reach agreement.

² R.S.B.C. 1979 c. 435.

C. Separate v. Shared Rights

Under the former law, each spouse was entitled to his or her separate property. In many cases, the fact that the dependent spouse did not share in family property in the other spouse's name probably led to little injustice. Seldom is there much property over which any dispute will arise. The dependent spouse's entitlement to maintenance often remedied any unfairness that arose from the law's inability to divide property.

A handful of cases, however, demonstrated dramatically how unfair the law could be. These cases arose at a time when community attitudes towards the rights and responsibilities of spouses had begun to change. Marriages where both spouses contributed financially to the well-being of the family became common. Increased career opportunities for women emphasized as well the value of homemaking services to the family. The concept of a dependent spouse became increasingly unrealistic. Maintenance after marriage breakdown, which preserved that dependence, was increasingly seen as an inappropriate remedy.

A system of shared rights in family property reflects the changed roles of spouses. The law should recognize that spouses are entitled to share in family property. The general philosophy of the *Family Relations Act* is sound.

The conclusion that spouses should be entitled to share property is only a starting point. There are many issues which must be resolved in a statutory scheme to accomplish shared property rights.

D. The System For Shared Property Rights

Of the issues which must be resolved in adopting a system of shared rights in family property, four may be regarded as fundamental. These are:

- (i) the basis of entitlement;
- (ii) when rights arise;
- (iii) what property is subject to division;
- (iv) the role of a discretion to vary entitlement to property.

1. BASIS OF ENTITLEMENT

Shared rights in family property can be based on one of two philosophical positions. Marriage may be regarded as a partnership or a merger of economic interests in which the spouses intend to share their property equally. The fact of marriage in itself justifies an equal division of property on marriage breakdown. Alternatively, entitlement to family property can depend upon the value of contributions made by the spouses. On marriage breakdown, property will be divided in accordance with the value of each spouse's contribution.

The common law and equity were often able to provide a remedy to a non-owning spouse who made *direct* contributions to the acquisition of assets. Difficulties were encountered, however, when the non-owning spouse's contribution was *indirect*. An indirect contribution is a contribution of money or money's worth which is not directly related to the acquisition or upkeep of an asset. Canadian courts eventually accepted that the constructive trust could be used to secure an interest in property for a spouse whose contributions were not directly related to its acquisition. In this way, courts were able to recognize the value of contributions made to the general economic well-being of the family unit.

The philosophy underlying the *Family Relations Act* is not easily determined. While the Act specifically recognizes that entitlement to family

property is related, at least in part, to the value of direct or indirect contributions made by a spouse to the economic well-being of the family unit, it also appears to suggest that entitlement to family property is an incident of marriage unrelated to contribution to the acquisition of property.³ For example, the courts are directed to consider the duration of the marriage and the needs of the spouses for economic independence when determining an appropriate division of family property. The Act also provides that entitlement is *prima facie* equal, but equal entitlement may be varied by reference to a number of factors, none of which specifically relate to the value of direct or indirect contributions made by a spouse. Moreover, the non-owning spouse may be entitled to share property to which contribution could not have been made, such as property owned before marriage or acquired by gift or inheritance.

In view of the fact that the legislation expressly incorporates conflicting criteria, it is not surprising that decisions under the Act are inconsistent. In some cases family property is divided equally with little reference to the contributions made by spouses. In other cases, the division of property is determined strictly in accordance with the value of spousal contribution. Courts which divide property equally after a short marriage, or despite actions by the non-owning spouse which have reduced the family's ability to acquire assets, or without considering whether the non-owning spouse made any real contribution at all, hold the view that entitlement to property is an incident of marriage. Courts which divide property unequally after a lengthy marriage or because of negative or inadequate contributions by the non-owning spouse hold the view that entitlement to property depends upon contribution. Even when courts are prepared to accept that entitlement to family property depends upon contribution, there is disagreement concerning whether entitlement depends upon contribution related to specific property, or contribution generally to the economic well-being of the family unit. Between the two extremes identified lie a confusing welter of cases in which principles based upon conflicting philosophies are applied.

Altering the *Family Relations Act* to provide that entitlement to a share in family property depends upon contribution would eliminate many of the problems currently arising under s. 51 of the Act. That section provides the courts with discretion to determine an appropriate division of family property but provides little guidance on how that discretion is to be exercised. The criteria listed in s. 51 suggest that entitlement depends upon a number of different and inconsistent philosophical bases. Balancing these criteria becomes largely an intuitive process, in which an individual judge's personal values and beliefs concerning the nature of marriage find expression. A judge's preference for equal sharing, separate property, or entitlement based upon a liberal or a strict theory of contribution may dictate the ultimate division of property, although the logic behind the decision will be stated in terms of the criteria listed in s. 51. That this is so reflects no criticism of the judiciary. The present legislation leaves fundamental questions unanswered. The test of unfairness requires each judge to apply the provisions of the *Family Relations Act* as he or she thinks is fair.

³ In contrast, every other Canadian common law jurisdiction provides that spouses have equal rights in family property and their entitlement derives from their direct and indirect contributions to the family: *Matrimonial Property Act*, R.S.A. 1980, c. M-9, s. 8; *The Marital Property Act*, S.M. 1978, C. 24/M 45, preamble; *Marital Property Act*, S.N.B. 1980, c. M-1.1, s. 2; *The Matrimonial Property Act*, S. Nfld. 1979, c. 32, ss. 3, 17; *Matrimonial Property Act*, S.N.S. 1980, c. 9, preamble; *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 4(5); *Family Law Reform Act*, R.S.P.E.I. 1974, c. F-2.1, s. 3(7); *The Matrimonial Property Act*, S.S. 1979, c. M-6.1, s. 20; *Matrimonial Property Ordinance*, R.O.N.W.T., c. M-7, s. 28(4); *Matrimonial Property and Family Support Ordinance*, O.Y.T. 1979 (2nd), c. 11, s. 6.

The Act should be revised to clarify the basis of entitlement to family property. A philosophy adopted in a number of other jurisdictions is that entitlement depends upon the value of direct and indirect contributions to the well being of the family. Each spouse shares mutual obligations and responsibilities. These include child care, household management and financial provision. Each of these obligations is of equal worth to the family. Consequently, while entitlement to family property depends upon contribution, this is only a general principle. There is no direct correlation between the value of direct and indirect contributions and the interest to which a spouse is entitled.

There is some question whether the courts should be able to vary equal entitlement by reference to whether spouses contributed according to a reasonable standard in the circumstances, and this issue is addressed later in this chapter. In any event, the courts should not be able to depart from equal entitlement where the spouses observed a mutual agreement concerning each spouse's expected contributions to the family unit.

2. WHEN RIGHTS ARISE

(a) *Generally*

Two events naturally suggest themselves as appropriate reference points for entitlement to family property to arise. These are marriage and marriage breakdown. In Canadian common law jurisdictions, entitlement arises on marriage breakdown.

The date of marriage breakdown may be difficult to determine, and various specific events may be selected as evidence of its occurrence: the date of separation, of making a separation agreement, or of court order acknowledging marriage breakdown or entitlement to property.

Two concerns must be taken into consideration when determining an appropriate date for entitlement to family property to arise. These are (i) the interests of third parties, and (ii) protecting the rights of the non-owning spouse. Delay in the vesting of property rights permits the owning spouse to deal independently with his or her separate property. Third parties can deal with the owning spouse without concern over the interest of the non-owning spouse. On the other hand, an immediate vesting of an interest in property on marriage provides the non-owning spouse with a voice in the handling of property, since his or her consent will be required before any prudent third party would deal with the property.

In practice, persons dealing with spouses on the basis of their ownership of property usually require both spouses to be parties to agreements. As a general rule, rights the non-owning spouse may assert against the owning spouse will be subordinate to the interests of third parties. This will be true whether family property rights vest on marriage or are deferred until marriage breakdown.

The system of deferred rights adopted in British Columbia accommodates third party interests, and in that respect it is convenient. Even so, it has given rise to several problems.

(b) *Triggering Events*

The *Family Relations Act* lists several events which evidence marriage breakdown and "trigger" entitlement to family property. This approach suggests that the non-owning spouse has no interest in family property before marriage breakdown. This concept has led to some confusion.

Deferring rights in family property is designed to accommodate several practical considerations. Ownership of property should be readily ascertainable. The rights spouses have against each other should not affect rights enjoyed by third parties. Moreover, during the currency of the marriage, ownership of property is usually a matter of little consequence. The courts need not possess jurisdiction to divide family property until marriage breakdown. In the meantime, third parties are not discouraged from dealing with the legal owner of property. This is usually advantageous to both spouses.

The courts, however, have given greater weight to the concept of a deferred property right than it merits. While a non-owning spouse may not have specific rights in family property during the marriage, he or she has an inchoate interest which ought to be protected. The *Family Relations Act* does not define the nature of this interest. Predictably, problems have arisen in a number of cases as a result of that omission.

During marriage, for example, family property may be sold and the proceeds invested in non-family property. Since the non-owning spouse's property rights do not arise until marriage breakdown, analytic problems arise in dealing with property which has been disposed of during the marriage or exchanged for other property. In some cases the courts have adopted common law and equitable principles to trace the original property into its substitute, but this process requires acknowledging property rights antedating marriage breakdown. This would appear to be inconsistent with the very notion of a deferred property right.

(c) The Nature of the Non-Owning Spouse's Interest

Marriage breakdown is a convenient time to *acknowledge* spousal interests in property. It should be recognized however, that the non-owning spouse has an inchoate interest in property throughout marriage. This interest need not be protected by vesting rights in property during the currency of the marriage. This inchoate interest may be regarded as a purely personal right of significance only as between the spouses.

The approach adopted by the *Family Relations Act* is to provide that on marriage breakdown spouses are each entitled to a half interest in family assets as a tenant in common. The consequences of this approach are uncertain. If proprietary rights vest upon marriage breakdown, the non-owning spouse's interest should have priority over third party interests that arise after that time. Whether that result is desirable is open to question.

The disadvantage of vesting proprietary rights upon marriage breakdown is that it has the potential to disrupt commercial arrangements. Third parties dealing *bona fide* with the owning spouse may be prejudiced. The advantage of vesting proprietary rights on marriage breakdown is that it protects the non-owning spouse at a time when the owning spouse is most likely to act to prejudice the non-owning spouse's position.

The *Family Relations Act* should be revised to clarify the nature of the non-owning spouse's interest in family property. On balance, we would prefer characterizing that interest as a personal right. Providing that the non-owning spouse has only a personal right to share in family property, exercisable against the owning spouse, protects third parties. This approach leaves the non-owning spouse at some risk since his or her position may be prejudiced by the owning spouse's fraudulent or reckless actions. The non-owning spouse, however, would be entitled to compensation for losses that arise in these circumstances. Moreover, fraudulent transactions could be set aside. This approach should benefit all parties in the majority of cases. For this reason, we prefer it. Moreover, it has the advantage of simplicity.

(d) Determining and Valuing Entitlement

The courts use the system of deferred rights in property as an indirect means of apportioning spousal entitlement to it. Courts may refer to a number of different dates to determine what property is divisible, the value of the property and the extent of the non-owning spouse's interest in the property. It is open to the courts, for example, to value property at the date of separation or the date of trial. Using these different dates may result in significantly different divisions of property. It is submitted that it is an error in principle to use valuation dates as a means of apportioning entitlement to property.

As a general principle, the share of property each spouse is entitled to should be determined when their joint contributions to the well-being of the family end. Determining the specific time that occurs might well be difficult in practice. The spouses, for example, might live together long after they sever their financial affairs and obligations. Alternatively, the spouses may separate, but each may continue to contribute to acquiring further property or enhancing the value of existing property.

For family property legislation to work well, it must adopt clear and objective rules. A general test for ascertaining a date for determining shares in property and their value is undesirable for that reason.

An objective approach may be devised that generally accords with the principles that we believe should underlie family property legislation. For example, shares in property and their value can be determined

- (i) at a date agreed to by the spouses;
- (ii) failing agreement, at the date of separation;
- (iii) failing agreement or separation, at the time of hearing.

When a date other than the time of hearing is to be referred to, the courts should take into account profit or loss associated with a spouse's interest to the time of the hearing, the value of use and enjoyment of property and further contributions made by the spouses. This approach should operate satisfactorily in most circumstances.

(e) Summary

Family property legislation should operate only as a default mechanism for determining rights between the spouses when they cannot reach agreement. In keeping with that conclusion, family property legislation should provide clear and objective rules that will operate satisfactorily in most cases. Any other approach depends heavily upon judicial discretion and risks unrestricted litigation, as our review of the current law demonstrates.

The nature of spousal interests must be clarified. This is important for the spouses and third parties who deal with them. An approach which should work well is as follows: Each spouse has exclusive management and control of his or her separate property until it is divided between them, by agreement or court order. Until that time, each spouse has a personal right to share in the other spouse's property, based upon their assumption of joint obligations which constitute contribution to the well-being of the family. These personal rights continue throughout marriage. A non-owning spouse should be entitled to compensation for losses arising from the other spouse's fraudulent or reckless dealing with property.

3. WHAT PROPERTY SHOULD BE DIVISIBLE?

A number of approaches may be adopted to determine what property is subject to division on marriage breakdown. For example, property used for a family purpose may be divisible. This approach is satisfactory for many

situations where the only property of value is the matrimonial home, but does not adequately address spousal interests in business property, savings, gifts or inheritances. A second approach is to list property that is subject to division. A third approach is to provide that only property accumulated during the marriage is subject to division. This approach is usually adopted in jurisdictions with a community of property regime. A fourth approach is to divide only property to which the spouses have directly or indirectly contributed.

The *Family Relations Act* has adopted a complicated approach to determining divisible property, which relies heavily on the exercise of discretion. In effect, all of the approaches listed above have been incorporated. Property used for a family purpose is divisible. Ventures and business assets are divisible if there has been direct or indirect contribution to their acquisition or maintenance. Some kinds of property are deemed to be family property (pensions, for example). Other kinds of property lend themselves to multiple descriptions and the courts encounter difficulties in selecting one from a number of different rules to determine their disposition.

Most jurisdictions which provide that spouses share rights in family property retain a concept of separate property.⁴ Property owned by a spouse before marriage and property acquired during marriage as a windfall (for example, by gift or inheritance) are commonly deemed to be separate property. The non-owning spouse may not acquire an interest in this property by operation of family property legislation. In British Columbia, on the other hand, there is only a very limited concept of separate property. It is restricted to property which is neither a family nor a business asset, or which is a business asset to which there has been no direct or indirect contribution by a non-owning spouse. Property which in other jurisdictions is frequently regarded as separate property may be divisible in British Columbia. The date of acquisition or the extent to which property was acquired by gift or inheritance are factors which British Columbia courts may take into account when dividing property. In other jurisdictions these factors determine conclusively whether assets remain separate property.

The formula adopted in British Columbia for determining divisible property causes confusion in two ways. First, while in other jurisdictions there is usually no doubt concerning what constitutes divisible property, in British Columbia this issue must often be resolved by a court. Since there is little guidance offered to the court in how to apply the criteria listed in s. 51, the court's decision is usually discretionary. Second, property to which one spouse was incapable of making a contribution is often subject to division under the Act. This obscures the philosophy underlying entitlement to family property.

The system adopted in British Columbia for determining divisible property is unduly complicated. A more objective scheme would adequately resolve disputes that may arise between spouses concerning division of their property. Earlier it was concluded that entitlement to share in family property should depend upon contribution. It follows that property to which a spouse cannot have contributed should not be divisible.⁵ The *Family Relations Act* should be revised to provide that only property acquired during the marriage should be divisible between spouses. Property owned before marriage or

⁴ See, e.g., Alberta, *supra*, n. 3, s. 7; Manitoba, *supra*, n. 3, s. 7; New Brunswick, *supra*, n. 3, s. 1; Newfoundland, *supra*, n. 3, s. 16; Nova Scotia, *supra*, n. 3, s. 4; Saskatchewan, *supra*, n. 3, s. 23.

⁵ An approach adopted in several cases: *Grosul v. Grosul*, [1983] B.C.D. Civ. 1640-10 (S.C.); *Forbes v. Bowler*, [1985] B.C.D. Civ. 1645-06 (S.C.). See also *Farr v. Farr*, (1984) 39 R.F.L. (2d) 1 (S.C.C.); *Guyane v. Forsythe*, (1983) 45 R.F.L. (2d) 86, 91 (B.C.C.A.); cf. *Rafferty v. Rafferty*, (1984) 39 R.F.L. (2d) 374 (S.C.).

acquired by one spouse by gift or inheritance should remain separate property. This approach has been adopted in American jurisdictions that have community of property, as well as in most other Canadian jurisdictions.⁶

The current Ontario legislation is similar to the British Columbia *Family Relations Act*. Legislation has recently been introduced in Ontario to alter the approach taken to determining divisible property between spouses.⁷ The Bill provides that the courts are to determine the net value of spousal property, as well as the net value of property each spouse brought into the marriage. The difference between current net value and the combined net value of property brought into the marriage is subject to division between the spouses. This approach was initially recommended by the Ontario Law Reform Commission⁸ and has much to commend it in terms of simplicity of operation.

4. THE ROLE OF DISCRETION TO VARY ENTITLEMENT TO PROPERTY

Currently, entitlement to family property is determined by the exercise of a broad judicial discretion. This discretion is relied upon to both ascertain divisible property and to decide an appropriate division of it.

Providing fixed rules for determining divisible property largely removes the need for judicial discretion. If any role for judicial discretion remains, it would be confined to determining when a departure from the general principle of equal sharing is justified.

Adopting contribution as the philosophical basis for sharing family property suggests a need for a limited discretion to depart from the principle of equal sharing. Spouses may contribute to the acquisition of property or the well-being of the family in unequal portions. One may easily question, however, whether there is much to be gained by varying entitlement to property by reference to how well a spouse performed his or her obligations, provided the performance was in a tolerable range of acceptability. Judicial discretion to vary equal entitlement will only be useful in exceptional circumstances, for example, where one spouse must be both wage earner and homemaker because the other spouse neglects his or her obligations.

Permitting courts to depart from equal sharing in exceptional circumstances risks litigation on this issue in every case. That is one reason for not permitting departures from equal sharing.

On balance, the authors of this Study Paper would prefer legislation to provide rules for dividing family property that do not rely on the exercise of judicial discretion. There is, however, some merit in providing for limited judicial discretion to depart from equal sharing. Either approach, consequently, would be acceptable. If courts are to have jurisdiction to depart from equal sharing, however, legislation must be carefully drafted to confine its operation to exceptional circumstances.

E. Need For Legislative Amendment

An issue to which we have given much thought is whether amendments to the *Family Relations Act* are necessary or desirable. It is, in fact, open to the courts to interpret and apply the provisions of the *Family Relations Act* to achieve consistent results, in accordance with our conclusions concerning the proper application of family property legislation.

⁶ *Supra*, n. 4; see also Prince Edward Island, *supra*, n. 3, s. 5(4) and Ontario, *supra*, n. 3, s. 5. In New Brunswick the courts have discretion to exclude premarital property from division, *supra*, n. 3, s. 1. Nova Scotia has adopted the same approach as in British Columbia, where the date and manner of acquisition are matters for the courts to consider when determining an appropriate division of property.

⁷ *Family Law Act*, 1985 (Bill 1).

⁸ *Family Property Law*, (Report on Family Law Part IV, 1974).

1. PROBLEMS OF TRANSITION

The implementation of legislation, particularly legislation which incorporates a judicial discretion, frequently generates litigation and some uncertainty while its provisions are tested and principles governing its operation are developed. Many of the problems arising under the *Family Relations Act* are transitional, reflecting the initial uncertainty that inevitably arises from significant legal change.

(a) Spousal Agreements

In the early years of the *Family Relations Act*, many cases raised the issue of whether spousal agreements could be varied under the Act. The courts had to distinguish between marriage agreements, separation agreements and post and ante nuptial agreements and determine whether they were governed by s. 51 or s. 54 of the *Family Relations Act*, as well as the proper operation of these sections. These issues have, for the most part, been resolved and they are seldom raised for reconsideration in recent litigation.

(b) Section 51(f)

Another example of problems of transition is to be found in the application of s. 51 of the *Family Relations Act*. The courts were originally concerned to narrow their discretion under that section. That approach tended to endorse the view that entitlement to property was an incident of marriage. More recently the criteria listed in s. 51 has been applied in increasingly sophisticated ways. The result has been an expansion of the court's discretion to determine an appropriate division of property. For example, s. 51(f) provides that the courts must consider

any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

Initially the courts were unprepared to accept the broad jurisdiction conferred by this provision. More recently it has been used to take into account contributions made by the spouses, the burden of custody of children and the significance of pre-marital cohabitation. In one respect, these changes in approach are desirable. Courts no longer feel confined to view entitlement to property as purely an incident of marriage, in which equal shares must as a general rule be ordered. The courts may determine entitlement according to contributions made by the spouses. In other respects, these changes are undesirable. Reference to the capacities of spouses, for example, enhances the discretionary nature of orders under s. 51, and further confuses the philosophical basis of shared rights in property.

(c) Conduct

A number of issues upon which authority appears to conflict should be resolved when legal analysis under the Act becomes more sophisticated, a result that usually accompanies several years of experience under new legislation. For example, the significance of the conduct of the spouses will be resolved when the courts distinguish between conduct which relates to marital fault, and conduct which relates to contribution. The resolution of the significance of conduct, however, also depends upon resolving the basis of entitlement to family property. Marital fault, for example, is probably irrelevant where entitlement to share in property depends upon contribution. It may well have relevance, however, where entitlement is regarded as an incident of marriage. In many cases, the courts have said that conduct is irrelevant, but it is difficult to fault a judge who is reluctant to award a generous share of one spouse's property to the other spouse whose conduct amounts to a gross repudiation of the marriage, especially if that conduct is the sole cause of marital breakdown.

(d) Property Rights and Maintenance Obligations

Before the introduction of the *Family Relations Act*, a dependent spouse's direct and indirect contributions to the acquisition of family property were frequently taken into account only when considering the question of maintenance. As a general rule, maintenance was calculated to provide the dependent spouse with a standard of living as close as possible to that enjoyed during marriage. Maintenance was often considered to be a continuing obligation which might last for the lifetime of the dependent spouse. This approach usually ensured that the ties between the spouses were never truly severed.

The introduction of shared property rights in family property was unaccompanied by legislative direction concerning how this altered approach affected rights to maintenance. The courts have adopted a number of different and inconsistent approaches to harmonizing the operation of property rights and maintenance obligations. Initially, many courts awarded the non-owning spouse a generous share of family property as well as a generous award of maintenance. Implicit in this approach is a conclusion that there is little interaction between property rights and maintenance obligations. This approach was often unduly harsh from the perspective of the income earning spouse. It tended to destroy that spouse's economic base while burdening him with an onerous financial commitment.

After some experience with the *Family Relations Act*, courts began to take a different view of the relationship between property rights and maintenance obligations. A generous share of property was often considered to be good reason for not awarding the dependent spouse maintenance. This approach was more realistic than the former approach, but it too often led to disastrous consequences. The dependent spouse now owned property, but had insufficient income to maintain it. The falling property market of the last five years made it difficult for the dependent spouse to convert assets into the money needed for support. In these circumstances, the dependent spouse would probably have been better off receiving generous maintenance instead of a share in property.

More recently, courts have acknowledged the need for maintenance, notwithstanding an award of property, to allow the dependent spouse time to arrange for his or her support. To this end, courts have awarded maintenance for a limited period only.

(e) Business Assets

In the early years under the *Family Relations Act*, courts disclosed an unwillingness to divide business assets, and this approach often made sense, since it ensured that the income earner's livelihood was preserved. Often that was of benefit to both spouses. Later courts were more willing to divide business assets. This often had disastrous consequences, since it often required liquidating the business. The situation in the prairie provinces clearly indicated the problems that might arise from this approach. The physical division of farm and ranch land left both spouses with business operations which were too small to be economically productive. Reported cases do not disclose the aftermath of a division of assets, but it is probable that similar problems have arisen in British Columbia when businesses were physically divided between the spouses.

In order not to destroy the spouses' economic base, some courts refused to divide property, but instead gave the dependent spouse a continuing interest in it. This might be done in two ways. The non-owning spouse's interest might be assigned a monetary value and the spouse given a charge against the

business assets to secure that interest. Alternatively, the non-owning spouse might be given a share in ownership of the business assets, by the transfer of property or shares to the spouse. Of these two approaches, the former is probably preferable. The latter approach involves dividing the management and control of the business. Spouses following marriage breakdown are often embittered. They are unlikely to make the best business partners.

In some cases the courts have expressly taken into account the consequences of a division of family or business assets.⁹ Unfortunately, these considerations often move the courts to award generous maintenance instead of a share in property.¹⁰ A course more in keeping with the philosophy of the *Family Relations Act* would be to continue to divide property, but provide that the non-owning spouse's interest would be bought out over a period of time. Shared property rights in themselves do not cause problems. It is ignoring the disruption that will arise from immediately satisfying those rights that leads to unsatisfactory results.

(f) *A Brief List of Unresolved Issues*

The following is an incomplete list of issues upon which authority conflicts

- (i) Should spousal agreements be reviewable if they are improvident? or only if they were unfairly obtained? Is the test for variation unfairness or unconscionability?
- (ii) What kind of contribution is necessary to convert a business asset into a family asset? Must the contribution be related to the acquisition or maintenance of particular assets? or is contribution to the economic well-being of the family unit sufficient?
- (iii) If a business asset is to be treated like a family asset by reason of contribution, what principles govern its division? Should it be divided like any other family asset? Or, is its division governed solely by reference to the value of the non-owning spouse's contributions?
- (iv) What is the extent of the test of use for a family purpose for determining whether an asset is divisible? Is intention to use an asset for a family purpose satisfactory? May an asset specifically excluded from family use be a family asset?
- (v) Are the criteria listed in s. 51 which direct the courts to consider the time of acquisition of property and whether it was acquired by gift or inheritance determinative of whether the property is divisible or only relevant determining the extent of the non-owning spouse's interest in property?

2. CONCLUSION

It is difficult to say whether the courts will be able to resolve these and other issues arising under the *Family Relations Act*. Several factors suggest that a consistent body of precedent is unlikely to emerge under the Act.

First, the *Family Relations Act* confers on the courts a generous discretion. This discretion is applied with reference to the circumstances of the particular case before the court. Experience indicates that precedents involving the exercise of a discretion are seldom helpful except with respect to the

⁹ See, e.g., *O'Connell v. O'Connell*, [1981] B.C.D. Civ. 1645-11 (S.C.); *Peterson v. Peterson*, [1982] B.C.D. Civ. 1664-04 (S.C.).

¹⁰ *Ibid.*; cf. *Nolet v. Nolet*, (1985) 32 A.C.W.S. (2d) 383 (N.S.C.A.) where the wife was required to buy out the husband's interest in the family home over a period of years. The husband's interest was secured by a mortgage and interest was payable at below market rates.

development of very general principles. Case law under the *Wills Variation Act*, for example, is inconsistent for this reason.

Second, the *Family Relations Act* lends itself to a variety of interpretations. The complexity and sophistication of the principles adopted under the *Family Relations Act* appear to defy synthesis into a coherent theory.

Third, the provisions of the *Family Relations Act* have led to a number of procedural difficulties. One example is the conflicting authority on who bears the onus of proof with respect to establishing the significance of indirect contributions to the acquisition of business assets. The *Family Relations Act* depends upon litigation for its proper operation. These problems and disadvantages will remain even if the courts are able to resolve the substantive issues under the *Family Relations Act*.

These factors suggest that the *Family Relations Act* should be modified by legislation. They also suggest that a simpler, more objective approach, under which a number of basic concepts are clarified, is required.

F. A Brief Comparison of British Columbia Legislation with That of Other Canadian Jurisdictions

What most clearly emerges from a comparison with legislation of other Canadian jurisdictions is that British Columbia is the only jurisdiction that has not taken care to define the philosophy of family property legislation and to confine the court's discretion when dividing property. For example, most Canadian jurisdictions stipulate that as a general rule, spouses are entitled to equal shares of family property. The basis of this entitlement is spousal contribution.¹¹ The provisions of the Ontario Act on this issue are typical:¹²

Purpose - The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in subsections (4) and (6).

In British Columbia, the *Family Relations Act* does not define the philosophical basis for equal shares, and direct and indirect contributions are only relevant for determining entitlement to ventures and business assets.

In other Canadian jurisdictions divisible property is carefully defined, usually by a general definition of matrimonial property, combined with a list of property excluded from division. Property (or its value) frequently excluded includes gifts from third parties, inheritances, property brought into the marriage, damage awards, and property acquired after separation. These features of family property legislation, for the most part common in Canadian jurisdictions, are absent from the British Columbia legislation. Where other provinces provide specific legislative direction on the significance of particular factors, the British Columbia *Family Relations Act* relies entirely on unguided judicial discretion.

Other features of Canadian family property legislation, while not universal, are noteworthy. In British Columbia, doubt surrounds the significance of the spouses' conduct. The cases provide conflicting authority on whether marital fault, contribution or intention are to be taken into account when dividing family property. Manitoba,¹³ Newfoundland¹⁴ and Saskatchewan¹⁵

¹¹ *Supra*, n. 3.

¹² *Supra*, n. 3, s. 4(5).

¹³ *Supra*, n. 3, s. 13(3).

¹⁴ *Supra*, n. 3, s. 21.

¹⁵ *Supra*, n. 3, s. 25.

provide that morally blameworthy conduct is irrelevant. Alberta provides that the courts may take into account oral agreements between the spouses.¹⁶ While these examples do not provide complete legislative guidance on the significance of conduct, they go some way towards resolving the issue. In a jurisdiction in which legislation provides that entitlement to family property depends upon contribution, immoral or improper conduct is irrelevant in determining a fair division of family property, and spousal agreements are binding, there is little room for argument concerning the significance of conduct as it relates to contribution, marital fault or intention. In British Columbia, on the other hand, these are issues which the courts are frequently asked to resolve, but on which the *Family Relations Act* is silent.

The approach of other provinces to the spouses' financial means and earning capacity is also interesting. In British Columbia, this factor must be considered in determining an appropriate division of family property. No guidance is offered, however, on its proper application. Since it is also a factor to be considered in determining maintenance, confusion as to its significance in determining an appropriate division of family property is inevitable. In Manitoba¹⁷ and Saskatchewan,¹⁸ this factor is framed differently. When determining an appropriate division of property, courts are directed to consider

... the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage.

This approach differs fundamentally from that adopted in of British Columbia. This factor is only relevant if the marriage in some way impairs the spouses in returning to their former status. As a result, in these provinces there appears to be little confusion concerning application of this factor to determine an appropriate division of property. It is a separate consideration from those which must be taken into account to determine an appropriate level of maintenance.

There are a number of other issues unresolved in British Columbia which have been addressed by legislation in other jurisdictions. In British Columbia, the courts have a wide and unfettered discretion to determine the date at which family property is to be valued. In Manitoba, property is valued at a date agreed upon by the spouses, and failing agreement, on the date cohabitation ceased.¹⁹ This approach reinforces the philosophy that entitlement to family property depends upon contribution. In British Columbia, there is doubt concerning the significance of contribution by one spouse to the education or career potential of the other spouse. In Saskatchewan²⁰ and Nova Scotia,²¹ the courts are directed by legislation to take this factor into account when dividing family property.

G. Summary of Conclusions

In this Study Paper, a number of conclusions respecting the proper operation of family property legislation have been reached. In this section we summarize those conclusions and indicate possible amendments to the *Family Relations Act*. These conclusions define a general outline of family property

¹⁶ *Supra*, n. 3, s. 8(g).

¹⁷ *Supra*, n. 3, s. 13(2)(h).

¹⁸ *Supra*, n. 3, s. 21(g).

¹⁹ *Supra*, n. 3, s. 15.

²⁰ *Supra*, n. 3, s. 21(f).

²¹ *Supra*, n. 3, s. 13(g).

legislation. A number of points of detail have not been addressed although legislative guidance on these other issues would also be desirable.

1. Family property legislation should operate as a means of resolving disputes where the spouses cannot reach agreement. Spousal agreements relating to the division of property should not be reviewable by the courts unless void or voidable at law. Section 54 should be repealed. Section 51 should only operate in the absence of a valid spousal agreement.

2. As a general rule, spouses should share defined property. The non-owning spouse should have a personal right, exercisable against the owning spouse, to share in property, and that right should exist throughout the marriage.

3. The basis of shared rights in family property should be contribution. The *Family Relations Act* should be revised to confirm the basis for shared rights in family property by including a section equivalent to the following, which is modelled after s. 4(5) of the Ontario *Family Reform Act*:

Purpose - The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in this Act.

4. Shares in property and their value should be determined by reference to:

- (i) a time agreed to by the spouses;
- (ii) failing agreement, at the time the spouses separated;
- (iii) in the absence of agreement or separation, at the time of trial.

Profit or loss attributable to the interest of the non-owning spouse following the valuation date should be taken into account.

5. Only property acquired after marriage begins should be divisible between the spouses. The family purpose test is defective, as is the distinction between business and family assets and the distinction between business assets and ventures. Since the basis of entitlement to property is contribution, only property acquired during the time the non-owning spouse has contributed to the well-being of the family unit should be divisible. The *Family Relations Act* should be revised to provide that all property owned by the spouses is divisible except for:

- (i) property brought into the marriage;
- (ii) a gift to one spouse from a third party;
- (iii) an inheritance received by one spouse;
- (iv) property acquired after separation.

Increases in the real value of separate property following marriage or the receipt of property should be divisible between the spouses.

6. Consideration should be given to adopting a system which divides the net value of property.²² Basically, under this approach, the value of separate property is subtracted from the current value of property owned by the spouses. An equalization payment is made by one spouse to the other so that each shares equally in the increase in wealth following marriage.

7. One of two approaches can be adopted toward varying equal entitlement.

²² The operation of this approach has been thoroughly considered in other jurisdictions, and guidance can be sought from *Report on Family Law*, Part IV Law Reform Commission of Ontario (1974), *Tentative Proposals for Reform of the Matrimonial Property Act*, Law Reform Commission of Saskatchewan (1984), *Matrimonial Property Act*, R.S.A. 1980, c. 4-9; *The Matrimonial Property Act*, S.M. 1978, c. 24/M45 and the Ontario *Family Law Act*, 1985 (Bill 1).

(i) The authors of this Study Paper favour no departure from equal sharing. This position appears to be, but is not, inconsistent with the principle that entitlement depends upon contribution. It is based on the conclusion that a careful definition of divisible property removes the need for judicial discretion in determining an appropriate division of family property. Circumstances which might justify unequal sharing will be rare, and the possible injustice that might arise from providing no remedy in those cases is offset by the benefit received by spouses who in the vast majority of cases, will be able to divide family property without resort to litigation.

(ii) The alternative is a limited jurisdiction to vary equal sharing in *exceptional* circumstances, giving consideration to listed criteria. The following criteria *should not* be considered when determining an appropriate division of property:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self-sufficient;
- (f) marital fault.

The first four criteria have already been taken into account in determining divisible property. The fifth criterion is a maintenance consideration. Marital fault cannot affect entitlement to property based on contribution.

The following criteria *should* be considered when varying an equal division of property:

- (a) the extent to which a spouse has not contributed directly or indirectly to the well-being of the family unit according to a standard:
 - (i) reasonable in the circumstances;
 - (ii) to the best of the spouse's ability; or
 - (iii) agreed upon by the spouses.²³
- (b) direct or indirect contribution by one spouse to the education or career potential of the other spouse;
- (c) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and circumstances of the marriage;²⁴
- (d) previous distributions of property between the spouses;
- (e) any debts or liabilities of a spouse including debts paid during the course of the marriage;
- (f) the consequences following from a division of property to the economic well-being of one or both spouses;²⁵

²³ The concept this criteria attempts to encapsulate is possibly ambiguous. The *value* of each spouse's contribution, as a general rule, is irrelevant. Differences in contribution are to be determined by reference to the standard of contribution expected from each spouse. An alternative approach is to frame this concept as the abandonment by a spouse of the obligations of the marital relationship: see, e.g., *Bernat v. Bernat*, (1983) 26 Sask. R. 276, 279. Another alternative has been proposed by the Saskatchewan Law Reform Commission: "a substantial failure of a spouse to make the contribution that would ordinarily be expected of that spouse in the circumstances of the marriage." *Tentative Proposals For Reform of the Matrimonial Property Act*, (L.R.C. Sask., 1984), 34.

²⁴ While the authors of this Study Paper favour inclusion of this criterion, it should be observed that Saskatchewan family property legislation has a similar provision. The Saskatchewan Law Reform Commission observed that, to their knowledge, this criterion had not been applied in any case: *ibid.* at 27-8.

²⁵ This concept is difficult to encapsulate in legislative language. The principle is that the courts should have regard to the aftermath of a division of property. For example, will dividing a business leave both spouses with a business or destroy it? Will an award of a share of assets leave the income earning spouse at risk in the event of economic recession? These considerations might suggest a different division of property. It is arguable, however, that this factor should not justify a departure from equal sharing. It should only be significant in determining what property should be appropriated to satisfy the interests of each spouse.

- (g) the terms of any oral or written agreement other than a valid spousal agreement, or the conduct of the spouses evidencing a tacit agreement, concerning the division of their property;
- (h) the duration of cohabitation preceding marriage.²⁶

8. A spouse should have exclusive management and control of his or her separate property until the property is divided between the spouses, either by agreement or court order. The non-owning spouse should be entitled to compensation for losses deliberately or recklessly incurred, but not for losses arising from economic circumstances. Specifically, a non-owning spouse should be entitled to compensation for:

- (a) a substantial gift of property to a third party;
- (b) a transfer of property to a third party other than a *bona fide* purchaser for value; or
- (c) the unreasonable dissipation of property by the other spouse.

The foregoing summary of conclusions represents only the broad outlines of an approach to dividing family property on marriage breakdown. In many respects, these conclusions are the product of compromise. Many people may believe that marriage justifies different approaches to dividing family property. Some will prefer the equal sharing of all property owned by the spouses, others separate property. Family property legislation will serve all spouses best if it first permits them to decide for themselves how their property is to be divided, and provides a clear, objective system for dividing property when the spouses neglect to, or cannot, agree.

Many points of detail remain to be worked out. Legislation on family property should leave as few issues as possible to be resolved through litigation. What follows is an incomplete list of issues which might be addressed in family property legislation:

1. The status of particular kinds of property: e.g. personal injury awards; insurance proceeds; personal effects.
2. Whether inflationary increases in value should be divisible. Whether depreciation in the value of separate property should be taken into account.
3. Problems arising where the value of spousal property on marriage breakdown is less than the value of spousal property on marriage.
4. How to value pensions, career assets and other kinds of intangible property.

²⁶ Alternatively, property acquired during cohabitation prior to marriage could be included as divisible property. The authors have rejected this position. Persons who decline to marry for some time may do so for the specific reason of keeping their estates separate. Marriage should not retroactively alter these arrangements, but define the spouses' future status.

This Study Paper was prepared for the Law Reform Commission of British Columbia. The terms of reference were broad, and the primary concern was to determine the state of the law under the *Family Relations Act*. Suggestions for amendments to the *Family Relations Act* are those of the authors of this Study Paper and not of the Law Reform Commission of British Columbia.

The focus of this Study Paper has been the operation of the law governing family property. This examination has led to some consideration of the law governing custody and support obligations. These other areas of the law are important and probably in need of assessment as well. They are, however, outside of the scope of this Study Paper.

It is hoped that this Study Paper will promote discussion, and assist the legislature in its task of reviewing the family property provisions of the *Family Relations Act*. It is also hoped that the discussion of case law will be of assistance to the public in understanding the current law governing family property, and to members of the legal profession involved in family law matters.

When this project was begun, the intention was to produce a survey of the current law governing family property legislation. Analysis of case law under the *Family Relations Act*, however, revealed little more than fundamental disagreement among judges concerning the proper operation of family property legislation. That discovery suggested a broader scope for this Study Paper. It motivated an inquiry into the reasons for the proliferation of inconsistent authority, and the staggering number of cases involving disputes over family property.

Research on discrete issues relating to family property often revealed a series of cases that were apparently irreconcilable. More surprisingly, issues which had been litigated many times over were frequently regarded by the courts as matters of first impression. Court of Appeal authority carried remarkably little weight.

Our initial hypothesis was as follows: the *Family Relations Act* provides an exceedingly flexible jurisdiction to divide property by reference to the circumstances of the case. The significance of particular circumstances is often not apparent from the facts recorded in reported judgments. Apparent inconsistencies in reported cases might be resolved in the full light of the circumstances revealed to the trial judge.

This hypothesis was difficult to test. It quickly became apparent, however, that while it held some validity, it was incomplete. In fact, the weight given to the circumstances of the marriage masked the true difficulties inherent in British Columbia law governing family property.

We adopted a different approach to cataloguing decisions under the *Family Relations Act*. First we attempted to identify a number of different rationales justifying shared rights in family property. Three separate rationales were identified:

- i. marriage evidences the mutual intention of the spouses to share all their property;
- ii. spouses are entitled to share property to which they have contributed money or money's worth;

- iii. spouses are entitled to share property acquired during the marriage, because their separate efforts have in fact benefited each other.

Each of these rationales is based upon a different model of marriage. The first views marriage as a union of body, soul and property. The second views marriage as not affecting property rights. The third views marriage as a partnership.

There is not, and probably never will be, consensus on what the marriage relationship entails. That is probably why the *Family Relations Act* incorporates a generous judicial discretion to divide family property. The circumstances of the particular marriage should dictate an appropriate division of property. It is, unfortunately, an approach which cannot succeed. Since there is no community consensus concerning how marriage affects property rights, it is unrealistic to expect the provisions of the *Family Relations Act* to be applied consistently from court to court. Each judge's view of marriage shapes his interpretation of the *Family Relations Act*. It is probable that an examination of cases on a judge by judge basis would disclose a consistent application of the provisions of the *Family Relations Act*. However, consistency between the decisions of Judge A, who favours separate property, and Judge B, who favours community property, will only emerge from time to time, and then only accidentally.

An examination of case law under the *Family Relations Act* from this perspective, revealed that the cases fell neatly into categories reflecting different philosophical stances. That is the only finding of significance to be gleaned from this Study Paper. It is the core of the problems that arise under the *Family Relations Act*.

There is only one way to restore certainty to family property litigation, and that is to define the philosophical basis for entitlement to share in family property. That much is clear. Defining the features of a system for dividing family property, however, presents immense problems.

As we mentioned earlier, there is no consensus concerning the significance of marriage as it relates to entitlement to family property. It is inappropriate, consequently, for the legislature to decide that issue. It is an issue that spouses should be able to decide for themselves. The *Family Relations Act* adopted a curious approach in this respect. The Act declines to adopt a particular model for shared rights in family property. It also prevents spouses from deciding that issue for themselves, since spousal agreements are freely reviewable.

The scope of family property legislation must be less ambitious. Spouses should be able to decide for themselves how their property is to be divided. Only where they are unable to reach agreement is legislation necessary. It is unrealistic to expect legislation to address the bewildering array of circumstances which may exist in any particular marriage.

In this Study Paper, the authors have suggested a number of features that might be incorporated in family property legislation. But these are only suggestions. There is only one conclusion which the authors consider vital. *Family property legislation should only operate in the absence of agreement between the spouses on an appropriate division of their property. Family property legislation must define the philosophy underlying shared rights and*

*provide objective rules consistent with that philosophy.*¹ This Study Paper makes only that recommendation.

It was felt, however, that suggestions respecting the features of family property legislation would be useful. We have, consequently, identified a reasonable philosophy for shared rights in family property, and described objective rules consistent with that philosophy. There is little that is novel in these suggestions. Their counterparts can be found in most Canadian jurisdictions and other jurisdictions which have adopted community property. We recognize that there will be disagreement on many points of detail. Objective rules are necessarily arbitrary. Formulating elaborate exceptions and qualifications to general rules opens the door to litigation. Spouses involved in a bitter dispute are unlikely to receive much benefit from legislation aimed at resolving their problems which offers the opportunity for unrestricted litigation. The most which can be hoped of any rule is that it be certain in its application and that it operate fairly in the majority of cases. The only mechanism to resolve the myriad circumstances that arise in matrimonial disputes is an agreement tailored to the individual needs of the parties. "Default" legislation should provide reasonable and consistent solutions to problems that may arise. We are not particularly concerned that our suggestions be adopted. What is crucial is that the principles governing the division of family property be settled beyond dispute.

¹ A distinction should be drawn between agreements made before marriage breakdown occurs and those made after. In the former case, the parties will not be concerned with the provisions of family property legislation. In the latter case, the parties are likely to be in dispute, and unprepared to negotiate on any other basis than that dictated by family property legislation. Family property legislation will, consequently, tend to dictate the general provisions of spousal agreements made after marriage breakdown. In these circumstances, it is unduly sanguine to characterize family property legislation as "default" legislation.

In British Columbia, spousal agreements made before marriage are uncommon. It is difficult to determine why that is the case. The likely explanation is that, since such agreements are not binding, there is little point in making them.

The experience in Quebec is useful to note. There, marriage agreements are binding and, we are informed, most people will enter into a formal agreement dictating their property rights before marriage. In fact, marriage agreements commonly provided for results different than those which would ensue under Quebec law. For that reason, the Quebec *Civil Code* was altered in 1970, to bring it more in keeping with the expectations of spouses. The approach adopted in Quebec is very similar to the system of family property law suggested in this Study Paper.

Permitting spouses to enter into binding marriage agreements is likely to result in more such agreements being made. Agreements made on marriage breakdown in the face of an objective system for determining rights in family property will tend to reflect only those concessions parties are prepared to make to avoid litigation.

APPENDICES

Appendix A

FAMILY RELATIONS ACT R.S.B.C. 1979, c. 121

(Bill 34, *Family Law Reform Amendments Act*, 1985, was recently introduced in the legislature. Changes to be brought about by that Bill are not yet law, and have not been noted. They do not affect the provisions of the *Family Relations Act* respecting family property.)

PART 1

Interpretation

1. In this Act

"child" means a person under the age of 19 years;

"court" means the Provincial Court exercising the jurisdiction referred to in section 6, or the Supreme Court;

"guardian" means the person having all the powers and duties under section 25 respecting a child;

"guardian of the estate of a child" means the person having all the powers and duties under section 25 respecting the estate of a child;

"guardian of the person of a child" means the person having all the powers and duties under section 25 respecting the person of a child;

"parent" includes

(a) a guardian or guardian of the person of a child; or

(b) where this person contributes to the support and maintenance of a child for not less than one year,

(i) the stepmother or stepfather of the child, where a stepparent relationship is established

(A) By marriage between the stepparent and the mother or father of the child; or

(B) by the stepparent and the mother or father of the child living together as man and wife for not less than 2 years although not married to each other

and the proceeding by or against the stepparent is commenced within one year after the date the stepparent last contributed to the maintenance and support of the child; or

(ii) the father of the child, where the father and mother are not married to each other;

"spouse" means a wife or husband and includes,

(a) a former spouse for the purpose of proceedings to enforce or vary an order;

(b) where an order for dissolution of marriage, judicial separation or declaring the marriage to be null and void was made respecting a marriage of a person not more than 2 years before the person applies for an order under this Act, the person making application; or

(c) except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

Family advocate

2. (1) The Attorney General may appoint a person who is a member in good standing of the Law Society of British Columbia to be a family advocate.

(2) A family advocate may, notwithstanding any other Act and subject to the law of Canada, attend a proceeding under this Act or respecting the

(a) adoption of a child;

(b) guardianship of a child, guardianship of the person of a child or guardianship of the estate of a child;

(c) custody of, maintenance for or access to a child;

(d) alleged delinquency of a child; or

(e) *Family and Child Service Act*

and intervene at any stage in the proceeding to act as counsel for the interests and welfare of the child.

Family court counsellor

3. (1) The Attorney General may appoint a person to be a family court counsellor.
- (2) A family court counsellor
 - (a) where he has knowledge of a dispute that has given or may give rise to a proceeding described in section 2 or respecting a similar family matter, may offer the parties to the dispute any advice and guidance which, in his opinion, will assist in resolving the dispute; and
 - (b) may offer to refer parties involved in those disputes to a public or private family counselling service or agency where, in the opinion of the family court counsellor, the service or agency is qualified to assist in resolving the dispute.
- (3) Subject to the law of Canada, where
 - (a) a family court counsellor receives under subsection (2) evidence, information or a communication in confidence from a person who is a party to the proceeding, or from a child; and
 - (b) the person who gave the evidence, information or communication to the family court counsellor under subsection (2) does not consent to the family court counsellor disclosing the evidence, information or communication, the family court counsellor shall not disclose the evidence, information or communication in a proceeding in a court or tribunal, and no person shall examine him for the purpose of compelling him to disclose that evidence, information or communication.

Legal capacity

4. (1) No woman is under a legal disability in respect to a matter under this Act by reason only that she is a married or unmarried woman.
- (2) A child who is or has been married has capacity to make, conduct or defend an application under this Act without the intervention of a next friend or guardian *ad litem*.

Supreme Court jurisdiction

5. (1) The Supreme Court continues, subject to the *Divorce Act* (Canada), to have jurisdiction in all matters concerning the custody of, access to and guardianship of children, dissolution of marriage, nullity of marriage, judicial separation, alimony and maintenance.
- (2) The Supreme Court has jurisdiction in all matters under this Act.
- (3) Nothing in this Act shall be construed as limiting or restricting the inherent jurisdiction of the Supreme Court to act in a *parens patriae* capacity respecting a child before the court. [Note: see note to s. 8, *Supreme Court Act*. In addition, s. 7 of the *Divorce and Matrimonial Causes Act* (U.K. 20 and 21 Vict., c. 85, provides the new English court created in 1858 with jurisdiction to grant a judicial separation on the same basis as, and with the same effect and consequences as, the former decree for a divorce a mensa et thoro, and s. 16 provided that a judicial separation might be granted to either spouse on the ground of adultery, cruelty or desertion without cause for 2 years. Section 6 transferred jurisdiction in that type of "divorce", in nullity of marriage and in all matters matrimonial to the new court. The Supreme Court of this Province now exercises that jurisdiction in the Province. Since 1871, some jurisdiction in matters under that Act belongs to the Canadian Parliament. In 1972, the Province repealed the U.K. Act to the extent of its authority (not nullity); Parliament had repealed other portions in 1968.]

Provincial Court jurisdiction

6. (1) The Provincial Court has jurisdiction in all matters under this Act, except Part 3, respecting
 - (a) guardianship of the person of a child;
 - (b) custody of or access to a child;
 - (c) maintenance, including the enforcement of maintenance orders;
 - (d) occupancy of the family residence and the use of its contents; and
 - (e) the making of orders that a person shall not enter premises while they are occupied by a spouse, parent or child.
- (2) Nothing in this Act gives the Provincial Court the inherent jurisdiction described in section 5 (3).

Concurrent proceedings

7. (1) Where a proceeding may be brought in either the Provincial Court or the Supreme Court, the commencement of the proceeding in the Supreme Court is not a bar to a proceeding in the Provincial Court unless the Supreme Court makes an order granting or refusing to grant the same relief being applied for in Provincial Court.

(2) Where the Supreme Court and Provincial Court may each make an order for the same relief, the making of a Supreme Court order is not a bar to an application for a Provincial Court order in respect of relief that has neither been granted nor refused by the Supreme Court order.

Joining proceedings

8. Where, in a proceeding under this Act, it appears to the court that other matters under this Act or under any other Act or law of the Province or of Canada should be determined first or simultaneously with the matters at issue in the proceeding, the court may, on its own motion, or on application of a party to the proceeding,

- (a) join and hear all proceedings together, in so far as this is within the court's jurisdiction; or
- (b) direct that the application stand over until other proceedings are brought or determined

as the court, in its discretion, considers appropriate.

Interim orders

9. (1) Where application is made for an order under this Act, the court may, as it considers reasonable, make an interim order for the relief applied for and may direct that the interim order be served on the persons and in the manner it may specify in the interim order.

(2) In its discretion, the court may make an interim order under subsection (1) *ex parte*.

Consent orders

10. (1) With the written consent of the person against whom the order is made, a court may make an order under this Act against the person without a hearing, the completion of a hearing or the giving of evidence.

(2) An order made by consent shall not exceed the terms of the consent.

(3) Unless the ground is specifically admitted in the consent, the giving of a written consent under this section shall not be deemed to be an admission of a ground alleged in the proceeding.

Incorporation of terms of agreements in court orders

11. Where a court makes an order under this Act, the court may incorporate in its order all or part of a provision in a written agreement previously made by 2 or more parties to the proceeding, providing the provision is relevant to the proceeding.

Enforcement of Supreme Court orders by Provincial Court

12. Where a copy of an order for alimony, maintenance, custody or access made by or registered for enforcement with the Supreme Court is certified by a proper officer of that court and filed with the Provincial Court, the order, including alimony or maintenance arrears accrued before filing, may be enforced by the Provincial Court in the manner in which it enforces its own orders under this Act.

Order need not be served to be enforced

13. Where a proceeding is taken to enforce an order, it is not necessary to prove that the person against whom the order was made was served with the order.

Order under appeal remains in force

14. Where an order made under this Act is appealed, the order shall, unless the court that made it otherwise orders, remain in full force and effect pending the determination of the appeal.

Expert witness provisions respecting family matters

15. (1) In a proceeding under this Act, the court may, on application, including *ex parte* application, direct an investigation into a family matter by a person who

- (a) has had no previous connection with the parties to the proceeding or to whom each party consents; and
- (b) is a family counsellor, social worker, probation officer or other person approved by the court for the purpose.

(2) A person directed to carry out an investigation under subsection (1) shall report, in the manner which the court may direct, the results of the investigation.

(3) No person shall report to a court the result of an investigation under subsection (1) unless, not less than 24 hours before the report is to be given, he serves a copy of the report on every party to the proceeding.

(4) Where satisfied that circumstances warrant, the court may grant an exemption from subsection (3).

Appeals and commencement of other proceedings

16. (1) Subject to this Act, a proceeding under this Act, except for an appeal, may be commenced at any time.

(2) The Offence Act provisions respecting

(a) the Attorney General apply to the person on whose behalf the order in Provincial Court was made or refused; and

(b) the defendant apply to the person against whom the order in Provincial Court was made or refused

in an appeal, other than an appeal against a conviction for an offence, from the Provincial Court under this Act.

(3) Notwithstanding this section, the court to which an appeal is made may, on application, extend the period during which the appeal may be brought.

Special provision respecting orders for children

17. Where a court is satisfied that an application made to it by or on behalf of a spouse or parent for relief under this Act should also have been made on behalf of a child, the court may make an order for relief on behalf of the child.

Intervention by Attorney General or other person

18. (1) The Attorney General may intervene in a proceeding and contest or argue a question or matter arising in the proceeding that affects the public interest.

(2) Any person may apply to the court for leave to intervene in a proceeding and the court may make an order entitling that person to intervene.

(3) An order under subsection (2) shall be subject to the terms and conditions the court, in its discretion, considers appropriate.

(4) Where the Attorney General or a person intervenes under this section in a proceeding, he becomes a party to the proceedings.

Spouses compellable

19. In proceedings under this Act, spouses are competent and compellable witnesses for or against each other.

Variation or rescission of order

20. Subject to this Act, where a court has made an order under this Act, except an order under Part 3, the court may, on application, vary or rescind the order where circumstances have changed since the order was made or last varied.

PART 2

Interpretation

21. In this Part

"access" includes visitation;

"child" includes a child not yet born on the death of the child's father or mother but subsequently born alive;

"extraprovincial order" means an order, or that part of an order, of an extraprovincial tribunal that grants custody of or access to a child to a person;

"extraprovincial tribunal" means a court or tribunal outside the Province with authority to grant custody of or access to a child;

"Public Trustee" means the Public Trustee appointed under the *Public Trustee Act*;

"superintendent" means the Superintendent of Family and Child Service designated under the *Family and Child Service Act*.

Who is entitled to notice of proceeding

22. (1) Where application is made to a court under this Part, each parent of the child affected by the application and each adult person with whom the child usually resides must be served with notice of the proceeding.

(2) Notwithstanding subsection (1), on *ex parte* application, the court may, by order,

(a) exempt that person from the requirement to serve notice on a parent or adult person; or

(b) direct the persons to be served with notice and the manner of service, including substituted service.

Roles of Public Trustee and Superintendent of Child Welfare as guardians

23. (1) Subject to subsection (2), where a person other than the father or mother of a child is granted custody of the child by a court, the court in its order may direct that the superintendent is guardian of the person of the child or that the Public Trustee is guardian of the estate of the child.

(2) An order shall not be made under subsection (1) unless the superintendent or Public Trustee named in the order has been given a prior opportunity to be represented in the proceeding.

Best interests of child are paramount

24. (1) Where making, varying or rescinding an order under this Part, a court shall give paramount consideration to the best interests of the child and, in assessing these interests, shall consider these factors:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) where appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child; and
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately;

and give emphasis to each factor according to the child's needs and circumstances.

(2) Where the guardianship of the estate of a child is at issue, a court shall consider as an additional factor the material well being of the child.

(3) Where the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court shall not consider that conduct in a proceeding respecting an order under this Part.

(4) Where under subsection (3) the conduct of a person may be considered by a court, the court shall consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

Authority of guardian

25. (1) A guardian is both guardian of the person of the child and guardian of the estate of the child.

(2) Subject to this Act, a guardian of the estate of a child has all powers over the estate of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

(3) Subject to this Act, a guardian of the person of a child has all powers over the person of the child as a guardian appointed by will or otherwise had on May 19, 1917 in England under Acts 12, Charles the Second, chapter 24, and 49 and 50 Victoria, chapter 27, section 4.

Extended references

26. References to a guardian in sections 26 to 33, except in section 31, apply equally to a guardian of a person of a child or a guardian of the estate of a child.

Parental guardianship

27. (1) Subject to section 28, whether or not married to each other and for so long as they live together, the mother and father of a child are joint guardians unless a tribunal of competent jurisdiction otherwise orders.

(2) Subject to subsection (4), section 28 and section 30, where the father and mother of a child are or have been married to each other and are living separate and apart,

- (a) they are joint guardians of the estate of the child; and
- (b) the one of them who usually has care and control of the child is sole guardian of the person of the child unless a tribunal of competent jurisdiction otherwise orders.

(3) Where the father and mother of a child

- (a) have not married each other;
- (b) are living separate and apart; and
- (c) have been joint guardians under subsection (1) or under the order of a tribunal of competent jurisdiction, subsection (2) applies to the father, mother and child as though the father and mother were married.

(4) Where a tribunal of competent jurisdiction makes absolute a decree of divorce, or makes an order for judicial separation or declares a marriage to be null and void, a person granted custody by order in the proceeding is sole guardian unless a tribunal of competent jurisdiction transfers custody or guardianship to another person.

(5) Subject to section 28, where the father and mother of a child

- (a) have not been married to each other during the life of the child or 10 months prior to its birth;
- (b) are living separate and apart; and
- (c) do not share joint guardianship under this section or an order of a tribunal of competent jurisdiction,

the mother is sole guardian unless a tribunal of competent jurisdiction otherwise orders.

Guardianship agreement

28. (1) The father and mother described by section 27 (2) or (5) may, by a written agreement between them, provide that

- (a) they are joint guardians; or
- (b) one of them is sole guardian

of their child during the term of the agreement.

(2) The making of an agreement under subsection (1) does not bar the jurisdiction of a court to make an order respecting guardianship.

Loss of guardian

29. (1) Subject to subsection (2), where a joint guardian dies, the survivors or sole survivor continue as joint or sole guardians respectively.

(2) Where a guardian dies, a surviving mother or father of the child who is not a guardian at the time of the deceased's death shall not become a guardian except by order under section 30.

(3) If a child otherwise has no guardian or if the guardian appointed is dead, refuses or is incompetent at law to act,

- (a) the superintendent is guardian of the person of the child;
- (b) the Public Trustee is guardian of the estate of the child; or
- (c) paragraphs (a) and (b) both apply

as circumstances require unless a tribunal of competent jurisdiction otherwise orders.

(4) Where a guardian and a person who is not a guardian of a child marry, the marriage in no way

- (a) diminishes the powers, rights or duties of the guardian; or
- (b) vests in the other person powers, rights or duties of a guardian.

Jurisdiction of courts to make or give effect to guardianship

30. (1) Subject to this Act, a court may, on application,

- (a) appoint a guardian; or
- (b) remove from office a guardian appointed or acting by virtue of this Part or a deed or testamentary appointment.

(2) Where a child is over 12 years of age, a court shall not make or give effect under subsection (1) to an appointment unless

- (a) the child consents in writing to the appointment; or
- (b) where the child withholds consent to the appointment, the court is satisfied that the appointment is necessary in the best interests of the child.

(3) No person other than the father or mother of a child shall, under subsection (1) (a), be appointed guardian unless the court is satisfied that each parent of the child consents in writing to the appointment or, where a necessary consent has not been given, that

- (a) the parent who could give or withhold consent is not reasonably available; or
- (b) the consent is being unreasonably withheld.

(4) No order shall be made under subsection (1) unless the present and prospective guardians have been given notice and an opportunity to be heard in the proceeding.

(5) Where satisfied that circumstances warrant, the court may grant an exemption from subsection (4) respecting a present guardian.

Security

31. (1) The Supreme Court may order a guardian or guardian of the estate of a child to give the security the court considers necessary for the proper discharge of the guardianship powers, rights and duties and may order the guardian or guardian of the estate, as the case may be, or the personal representative of this person to

- (a) render a true and just account of all property of the child administered by him; and
 - (b) deliver and pay over the property to the person entitled after deducting only such reasonable amount for his expenses and charges as the court may approve
- on the termination of the guardianship.

(2) Where the giving of security is ordered under subsection (1), the Public Trustee is guardian of the estate of the child until the security is given.

(3) Notwithstanding subsection (1), the court shall not order the Public Trustee to give security under this section.

Referral of questions to court

32. A guardian may apply to a court for directions concerning a question affecting the child and the court may make the order in this regard it considers proper.

Resignation of guardian

33. A guardian whose appointment is made by order of a court under sections 25 to 33 may, by leave of the court, resign his office on the terms and conditions the court may impose.

Persons who may exercise custody

34. (1) Subject to subsection (2), the persons who may exercise custody over a child are, where

- (a) the father and mother live together, the father and mother jointly;
- (b) the father and mother live separate and apart, the parent with whom the child usually resides;
- (c) custody rights exist under a court order, the person having those rights; and
- (d) custody rights exist under a written agreement, the person to whom those rights are given.

(2) Where persons have conflicting claims to custody under subsection (1)

- (a) the person having custody rights under a court order;
- (b) where paragraph (a) does not apply, the person granted custody by an agreement;
- (c) where paragraphs (a) and (b) do not apply, the person claiming custody with whom the child usually resides; or
- (d) where paragraph (c) applies and 2 persons are equally entitled under it, the person who usually has day to day personal care of the child

may exercise custody to the exclusion of the other persons unless a court otherwise orders.

Jurisdiction to make custody or access orders

35. (1) On application a court may order that one or more persons may exercise custody over a child or have access to the child.

(2) An order for access may be made whether or not a custody order is made.

(3) Where a person has not received notice of a proceeding or has not been given opportunity to be heard in the proceeding, custody shall not be granted to that person.

(4) An order for custody or access may include terms and conditions the court considers necessary and reasonable in the best interests of the child.

Civil enforcement of custody rights

36. Where custody of a child is awarded to a person by an order made or enforceable under this Act and the person is denied the exercise of custody, a court may, on *ex parte* application, order that the child be apprehended by a peace officer and taken to that person.

Order prohibiting interference with child

37. Where a court makes a custody order or a custody order is enforceable by a court, the court may order that a person

- (a) shall not enter premises, including premises the person owns or has a right to possession of, where the child resides from time to time;
- (b) shall not make contact or endeavour to make contact with or otherwise interfere with either the child or any person having custody of or access to the child; or
- (c) where a court concludes that the person named in its custody order may not comply with an order under paragraph (a) or (b), the court may further order that the person
 - (i) enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks necessary;
 - (ii) report to the court or person designated for the period of time, and at the times and places, as the court considers necessary and reasonable; or
 - (iii) deliver up to the court such documents as the court thinks fit or any combination of these.

Enforcement of extraprovincial custody or access orders

38. A court on application shall enforce, and may make orders it considers necessary to give effect to, an extraprovincial order as if the extraprovincial order had been made by the court under this Act unless the court is satisfied on evidence adduced that the child affected by the extraprovincial order did not, at the time the extraprovincial order was made, have a real and substantial connection with the province, state or country in which the extraprovincial order was made.

Variation of extraprovincial custody or access orders

39. (1) Subject to subsection (2), a court on application may, by order, vary an extraprovincial order as if the extraprovincial order had been made by the court if it is satisfied that

(a) the child affected by the extraprovincial order does not, at the time the application for variation is made, have a real and substantial connection with the province, state or country in which the extraprovincial order was made or last enforced; and

(b) the child has a real and substantial connection with the Province or all the parties affected by the extraprovincial order are resident in the Province.

(2) Where an extraprovincial order is made in another province by a court with a federally appointed judge presiding, it may only be varied under this section by the Supreme Court.

(3) In varying an extraprovincial order under this section, the court shall give paramount consideration to the best interests of the child in the manner described in this Part and treat the question of custody as having a greater importance than the question of access.

Residency requirement

40. A person shall not be deemed to be resident in the Province when he is within the Province solely for the purpose of making or opposing an application under sections 38 to 42.

Additional power of Provincial or Supreme Court

41. Notwithstanding any other provision of this Act, where a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the custody of the person named in the extraprovincial order, the court may vary the extraprovincial order or make such other order for the custody of the child as it considers reasonable and necessary.

Proof of extraprovincial custody or access order

42. An application under sections 38 to 42 shall be accompanied by a copy of the extraprovincial order to which the application relates, certified as a true copy by a judge, other presiding officer or registrar of the extraprovincial tribunal or by the person charged with keeping the orders of the extraprovincial tribunal; and proof is not required of the signature or appointment of a judge, presiding officer, registrar or other person in respect of any certificate produced as evidence under this section.

International Child Abduction

42.1 [Enacted 1982-8-1, effective on the day that the convention under its terms extends to the Province.]

PART 3

Equality of entitlement to family assets on marriage breakup

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement;
- (b) a declaratory judgment under section 44;
- (c) an order for dissolution of marriage or judicial separation; or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

- (a) an order under this Part; or
- (b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

Declaratory judgment

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

Family assets defined

45. (1) Subject to section 46, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting the generality of subsection (2), the definition of family asset includes

- (a) where a corporation or trust owns property that would be a family asset if owned by a spouse,
 - (i) a share in the corporation; or
 - (ii) an interest in the trust owned by the spouse;
- (b) where property would be a family asset if owned by a spouse, property
 - (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or
 - (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
- (c) money of a spouse in an account with a savings institution where that account is ordinarily used for a family purpose;
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; or
- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

Excluded business assets

46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 45 (3) (e) or subsection (1), an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

Onus of proof

47. The onus is on the spouse opposing a claim under section 43 to prove that the property in question is not ordinarily used for a family purpose.

Marriage agreements

48. (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.

(2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

- (a) management of family assets or other property during marriage; or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

(4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2)(a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

(5) A minor who has capacity to marry has, with the prior consent of the Supreme Court or a County Court, capacity to enter into a valid marriage agreement.

(6) Where a minor who has capacity to marry has purported to enter into a marriage agreement without the consent required under subsection (5), the Supreme Court or a County Court may at any time order that the marriage agreement is binding on and is for the benefit of the minor.

(7) In a marriage agreement, a *dum casta* provision applicable where the spouses are living separate and apart is null and void.

(8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

(9) Where a marriage agreement provides that specific gifts made to one or both spouses are not disposable without the consent of the donor, the donor shall be deemed to be a party to the marriage agreement for the purpose of enforcement or amendment of the provision.

Filing in land title office

49. (1) A spouse who is a party to a marriage agreement or separation agreement may sign and file a notice in prescribed form setting out

- (a) the full name and last known address of each spouse who is a party to the marriage agreement or separation agreement;
- (b) a description of land to which the marriage agreement or separation agreement relates; and
- (c) the provisions of the marriage agreement or separation agreement that relate to the land described in the notice

in the land title office of the land title district in which land described in the notice is situated.

(2) On the filing of a notice under subsection (1), accompanied by payment of the prescribed fee, the registrar may register the notice, in the same manner as a charge is registered, against the land described in the notice.

(3) Where a notice is registered under subsection (2), the registrar shall not allow registration of a transfer, mortgage, agreement for sale or conveyance of the fee simple in the land, or lease of the land, unless each spouse or former spouse who is a party to the marriage agreement or marriage separation signs and files in the land title office a cancellation or postponement notice in prescribed form.

(4) Where a spouse or former spouse

- (a) cannot, after a reasonable search is made, be located;
 - (b) unreasonably refuses to sign or file a cancellation notice under subsection (3); or
 - (c) is a mentally incompetent person,
- the Supreme Court may, on application, order that the registrar cancel or postpone the notice of marriage agreement or separation agreement.

(5) Where a cancellation or postponement notice is filed under subsection (3) or an order is made under subsection (4), the registrar shall cancel or postpone the registration of the notice of marriage agreement or separation agreement in the same manner as the registration of a charge is cancelled or postponed.

(6) Where a provision of a marriage agreement or of a separation agreement relates to a mobile home, this section applies

- (a) for the registration of the notice described in subsection (1) as a security instrument under the Mobile Home Act against the mobile home; and
- (b) on registration of the notice, to subsequent dealings with the mobile home and notice.

Enforceability of interest in property

50. (1) In this section "interest of a spouse" means the interest of a spouse arising under section 43, a marriage agreement or a separation agreement.

(2) Section 29 of the *Land Title Act* applies to an interest of a spouse in land.

(3) Where, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property the interest is not enforceable against that person.

(4) Notwithstanding subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

Judicial reapportionment on basis of fairness

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self sufficient; or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse, the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Determination of ownership, possession or division

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

- (a) declare the ownership of or right of possession to property;
- (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
- (c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;
- (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
- (e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
- (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property; or
- (g) where property is owned by spouses as joint tenants, sever the joint tenancy.

(3) Where the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

Interim orders

53. Where a proceeding under this Part has been commenced, the Supreme Court may make an interim order to restrain the disposal of family assets or other property at issue, or for the possession, delivery, safekeeping and preservation of the property, and this order may be made *ex parte*.

Variation of marriage settlements

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

Application of this Part

55. (1) Where there is a conflict between this Part and the *Partition of Property Act*, or the *Married Woman's Property Act*, this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

PART 4

Obligation to support child

56. (1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child, taking into account the

- (a) cost of reasonable residential accommodation, housekeeping, food, clothing, education, recreation and supervision for the child;

- (b) child's need for a stable and supportive environment; and
- (c) financial circumstances and obligations of each person liable for the support and maintenance of the child.

(2) The making of an order against one parent for the maintenance and support of a child does not affect the liability of another parent for the maintenance and support of the child or bar the making of an order against the other parent.

Obligation to support spouse

57. (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to

- (a) the role of each spouse in their family;
- (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) custodial obligations respecting a child;
- (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves; or
- (e) economic circumstances.

(2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

Obligation to support parent

58. (1) In this section, "child" means an adult child of a parent and "parent" means a father or mother dependent on a child by reason of age, illness, infirmity or economic circumstances.

(2) A child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.

Application for an order

59. (1) A person may apply for an order under this Part on his own behalf.

(2) The Attorney General may designate in writing those persons who may make applications for orders under this Part on behalf of a parent described in section 58 or on behalf of a spouse.

(3) Any person may apply for an order under this Part on behalf of a child.

(4) A spouse or parent affected by an order under this Part or a person described in subsection (1), (2) or (3) may apply for an order altering, varying or rescinding the order or cancelling or reducing arrears under it.

Financial information

60. (1) Where proceedings are taken under this Part, Part 4.1 or Part 5 in respect of maintenance and support,

- (a) the person against whom the proceedings are taken, and
- (b) the person on whose behalf or by whom the proceedings are taken or, where that person is a child, the person having custody of the child, shall, on written request, provide each other with
- (c) copies of current or relevant income tax returns and assessment notices,
- (d) itemized statements of revenue and expenses, and
- (e) itemized statements of assets and liabilities.

(2) Where a person fails to comply reasonably with a request under subsection (1), the court may order an amount not exceeding \$5,000 for the benefit of the spouse, parent or child on whose behalf the request was made.

(3) The award under subsection (2) is additional to and not in place of any other remedy.

(4) Where a person receives an income tax return or assessment notice under this section, the person shall keep in confidence information or evidence obtained by him from it and shall not disclose that information or evidence except to his solicitor for the purpose of the proceeding or to the court.

Order for support and maintenance

61. (1) Subject to the *Divorce Act* (Canada), a court may make an order on application, or where the court makes or refuses an order for judicial separation or dissolution of marriage or a declaration that a marriage is null and void, requiring a party to the proceeding to discharge his liability under section 56, 57 or 58, as the case may be, by paying to the court or the person designated in the order the amount the court considers reasonable.

(2) Where a spouse or child will be living separate and apart from the spouse or parent against whom the application is made, the court may, as it considers appropriate adjust the amount of its order under subsection (1) to take into account the needs, means, capacities and economic circumstances of each spouse, parent or child, including

- (a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
 - (b) any other source of support and maintenance for the applicant spouse or children;
 - (c) the desirability of the applicant spouse or child having special assistance to achieve financial independence from the spouse or parent against whom the application is made;
 - (d) the obligation of the spouse or parent against whom application is made to support another person; and
 - (e) the capacity and reasonable prospects of a spouse or child obtaining an education or training.
- (3) An order under this section may also include one or more of the following:
- (a) payment of an amount periodically, annually or otherwise, and either for an indefinite or limited period or until the happening of a specified event;
 - (b) payment of a lump sum directly or in trust on terms provided;
 - (c) charging of property with payment under the order; or
 - (d) payment of support and maintenance from the date the application in the proceeding was served on the respondent.
- (4) Where the order benefits more than one person, the court shall specify the amount payable for each.
- (5) The Crown may accept an assignment in writing of the rights of a person respecting an order described in subsection (1) that is or may be made and the Crown is then subrogated to the rights of that person to apply for or obtain an order or to bring proceedings to enforce or vary the order during the term of the assignment.

Variation proceedings

62. (1) Where application is made to vary or rescind an order made under sections 56 to 62 or to reduce or cancel arrears under the order, the court shall consider changes in the needs, means, capacities and economic circumstances of each person affected by the order and make the appropriate change, if any.
- (2) A spouse or former spouse receiving maintenance under an order shall make reasonable efforts to become self sufficient as required by section 57(2) without prejudice to the continuing application, if any, of section 57(1).
- (3) Where the court finds that a spouse or former spouse is not making reasonable efforts under subsection (2), the court may reduce the amount of maintenance payable on behalf of the spouse or former spouse under an order made under sections 56 to 62.

Enforcement powers of Provincial Court and Supreme Court

63. (1) The Provincial Court and the Supreme Court each have the powers set out in sections 63 to 69 and Part 4.1.
- (2) The powers of the Supreme Court to enforce an order for support and maintenance are not limited to the powers set out in sections 63 to 69 and Part 4.1.

Filing in land title office

64. (1) An order made under sections 56 to 62, when certified by a proper officer of the court that made the order, may be registered in any land title office of the Province and shall charge the land of the person against whom the order is made, and shall be deemed to be a judgment as defined in section 74 of the *Court Order Enforcement Act*.
- (2) Section 76 (1) of the *Court Order Enforcement Act* does not apply to an order registered under subsection (1).
- (3) Where an order is registered under subsection (1), the court may, at any time, subject to the conditions as to security or otherwise it may consider necessary and reasonable, make an order
- (a) discharging or partially discharging the registered order; or
 - (b) postponing the registered order to allow the registration of a charge.
- (4) No order shall be made under subsection (3) unless notice has been given to any person and in any manner, including service by mail or by public advertisement, that the court may require.

Warrant of execution

65. (1) Where an order under sections 56 to 62 is not complied with, a person in whose favour the order is made, or any person on behalf of that person, may apply to the Provincial Court for a warrant of execution.
- (2) A warrant of execution shall not, unless the court in its discretion otherwise orders, be for the recovery of more than one year's arrears of maintenance, and shall be executed in like manner as an execution under the *Small Claim Act*.

Garnishment

66. (1) For the purposes of this section, "garnishee" means a person, or the Crown or a Crown agency, named in an order made under subsection (2) as, or likely to be, a debtor of a person against whom an order under sections 56 to 62 is made.

(2) The court may, on *ex parte* application by a person affected by an order made under sections 56 to 62 other than the person against whom it was made, make an order that shall, subject to subsection (3), be deemed to be an order made under section 4 of the *Court Order Enforcement Act*.

(3) Notwithstanding Part 1 of the *Court Order Enforcement Act*, an order made under subsection (2) shall, if provided in the order, remain in force for a period of 3 months, unless the court earlier discharges it, to seize and attach any debt that becomes owing, payable or due at any time while the order remains in force without further application or further order.

(4) Where the garnishee admits a debt, he shall promptly pay to the court the amount of the debt or the amount limited by the order, to be applied for the support and maintenance of the person for whose benefit the order under sections 56 to 62 was made.

(5) Payment under subsection (4) by a garnishee is, to the extent of the amount paid, a valid discharge of the garnishee as against the person who is the creditor of the garnishee.

Show cause on default

67. (1) Where a person defaults and is in arrears under an order made under sections 56 to 62, the court that made the order may, as often as default occurs, issue a summons requiring the person to appear at a time and place mentioned in the summons, or issue a warrant for the apprehension and presentation in court of the person in default, to show cause why the order should not be enforced under this section.

(2) At a hearing under this section, the court shall inquire into the circumstances of the person in default, and may, by order that may be subsequently varied to meet changed circumstances, enforce payment of the arrears by ordering, notwithstanding section 72 of the *Offence Act*, that the person in default be imprisoned for a period of not more than 30 days if the arrears or a specified portion of them are not paid by a date specified in the enforcement order.

(3) Where an enforcement order under subsection (2) is in force, money paid by the person in default shall be credited in the following manner:

- (a) an amount that became due and owing under the maintenance order after the date of the enforcement order shall be paid first;
- (b) a balance remaining after the amount referred to in paragraph (a) has been paid shall be applied against the arrears.

(4) Imprisonment under this section does not discharge the arrears referred to in the enforcement order.

Attachment orders

68. (1) Where, at the conclusion of a hearing under section 67, the court finds that the person in arrears is receiving sufficient remuneration from employment or other sources to comply with the order made under sections 56 to 62 but has not so complied, the court may make an attachment order directing every employer from time to time of the person in arrears, for so long as the order remains in force, promptly to deduct and pay to the court from that employee's remuneration as it becomes due and owing from time to time an amount specified in the attachment order, not exceeding the amount prescribed in Part 1 of the *Court Order Enforcement Act* for a garnishing order.

(2) Where an attachment order is made under subsection (1), it is binding on every current or subsequent employer who is served with a copy of the order.

(3) Money paid into court by the employer under subsection (1) shall be credited in the manner set out in section 67(3) and applied against the arrears and future maintenance payments as they become due and owing.

Proof of default or arrears

69. For the purposes of proving default or arrears under an order made under sections 56 to 62, the court may accept in evidence an affidavit made by any person deposing to have knowledge of, or information and belief concerning, the facts.

PART 4.1

Interpretation

70. In this Part

"Attorney General" includes, respecting the performance of a power or duty under this Part, a person authorized in writing by the Attorney General to act for him in the performance of the power or duty;

"certified copy", in relation to an order of a court, means a copy of the order certified by a judge or officer of the court to be a true copy;

"court" means an authority having statutory jurisdiction to make maintenance orders;

"dependant" means a person that a person, against whom a maintenance order is sought or has been made, is liable to maintain according to the law in force in the state or province where the maintenance order is sought or was made;

"maintenance order" means an order for the periodical payment of money as alimony or as maintenance for a spouse, former spouse or reputed spouse or a child, parent or any other dependant of the person against whom the order was made;

"reciprocating state" means a province of Canada or a state declared, under section 70.94 or under an enactment repealed by this Act, to be a reciprocating state.

Final order from outside British Columbia

70.1 (1) Where, either before or after the coming into force of this Part, a maintenance order has been made against a person by a court in a reciprocating state, and a certified copy of the order has been transmitted to the Attorney General, the Attorney General shall send a certified copy of the order for registration to a court in the Province designated by the Attorney General as a court for the purposes of this section, and on receipt of the certified copy the order shall be registered.

(2) Where it appears to the court that an order received for registration contains matter, or forms part of a judgment that deals with matter, other than an order for maintenance, the order may be registered in respect of those matters only which constitute the maintenance order.

(3) An order registered under subsection (1) has, from the date of its registration, the same force and effect, and, subject to this Part, all proceedings may be taken on it, as if it had been an order originally obtained in the court in which it is so registered, and that court has power to enforce the order, including payment of arrears accrued before registration in the Province.

(4) A maintenance order that makes payable sums of money expressed in a currency other than the currency of Canada shall not be registered under subsection (1) until the court in which it is sought to register the order, or, where that court is the Supreme Court, the registrar of that court, has determined the equivalent of those sums in the currency of Canada on the basis of the rate of exchange prevailing at the date of the order of the court in the reciprocating state, as ascertained from any branch of any chartered bank; and the court or the registrar, as the case may be, shall certify on the order the sums so determined expressed in the currency of Canada, and, on the registration of the order, it shall be deemed to be an order for the payment of the sums so certified.

Transmission of final orders for enforcement outside British Columbia

70.2 Where, either before or after the coming into force of this Part, a court in the Province has, on the application of a dependant who is resident in the Province, made a maintenance order against a person and it is shown to the court that the person against whom the order was made is resident in a reciprocating state, the court shall, on the request of the person in whose favour the order was made, send a certified copy of the order to the Attorney General for transmission to the proper officer of the reciprocating state.

Provisional order where respondent resides outside British Columbia

70.3 (1) Where an application is made to a court in the Province, by a dependant who is resident in the Province, for a maintenance order against a person, and it is shown that that person is resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any maintenance order that it might have made if proper notice of the proceeding had been duly served on that person and he had failed to appear at the hearing; but an order so made is provisional only and has no effect until it is confirmed by a competent court in the reciprocating state.

(2) Where the evidence of a witness who is examined on an application mentioned in subsection (1) is not taken in shorthand, or otherwise recorded, the evidence shall be in a statement in prescribed form or put into the form of a deposition; and the statement of deposition shall be read over and signed by the witness and also by the judge or other person presiding at the hearing.

(3) Where an order has been made under subsection (1), the court shall send to the Attorney General, for transmission to the proper officer of the reciprocating state,

(a) a certified copy of the order,

(b) the prescribed form of statement, the depositions or the certified copy of the transcript of evidence, and

- (c) the information that the court possesses for facilitating the identification of the person against whom the order was made and ascertaining his whereabouts.
- (4) Where a provisional order made under this section has come before a court in a reciprocating state for confirmation, and the order has by that court been remitted to the court in the Province that made the order for the purpose of taking further evidence, the court in the Province shall, after giving notice to the applicant, proceed to take the evidence in like manner, and subject to the like conditions, as the evidence in support of the original application.
- (5) Where upon the taking of the evidence under subsection (4) it appears to the court in the Province that the order ought not to have been made, or ought to be varied, the court may rescind or vary the order, and, unless the order is rescinded, the statement, depositions or the transcript of the evidence and the order, if varied, shall be sent to the court in the reciprocating state.
- (6) Where a provisional order made under this section comes before a court for confirmation in a reciprocating state and has not been confirmed in respect of one or more dependants, the court that made the order in the Province may, instead of hearing a new application, within one year from the date of the provisional order, reopen the case, receive additional evidence, and make, as it considers proper, a new provisional order that shall be deemed to be a provisional order under this section.
- (7) The confirmation of an order made under this section does not affect any power of the court that originally made the order to vary or rescind the order, but an order varying an original order has no effect until it is confirmed in like manner as the original order.
- (8) Where, after an order made under this section is confirmed, the court that originally made the order makes a varying or rescinding order, that court shall send a certified copy of the varying or rescinding order, together with the depositions or a certified copy of the transcript of any new evidence adduced before the court, to the Attorney General for transmission to the proper officer of the reciprocating state in which the original order was confirmed.
- (9) An applicant for a provisional order under this section has the same right of appeal against a refusal to make the order as he would have had against a refusal to make a maintenance order if a summons had been duly served on the person against whom the order is sought to be made.

Confirmation of orders made outside the Province

70.4 (1) Where

- (a) a maintenance order has been made by a court in a reciprocating state and the order is provisional only and has no effect until confirmed by a court in the Province,
 - (b) a certified copy of the order, together with the statements, depositions or transcript of evidence and a statement of the grounds on which the order might have been opposed if the person against whom the order was made has been a party to the proceedings, is received by the Attorney General, and
 - (c) it appears to the Attorney General that the person against whom the order was made is resident in the Province,
- the Attorney General may send the documents to a court designated by him as a court for the purposes of this section; and on receipt of the documents the court shall issue a summons or warrant calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon that person.
- (2) At a hearing under this section the person on whom the summons or warrant was served may raise any defence that he might have raised in the original proceedings if he had been a party to those proceedings, but no other defence; and the statement from the reciprocating state where the order was made, stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had appeared at the hearing, is conclusive evidence that those grounds are grounds on which objection may be taken.
 - (3) Where the court, by reason of the material before it and the evidence if any, adduced by or on behalf of the person against whom the order was made, or for any other reason, considers it necessary to hear further evidence by or on behalf of the applicant, it may, for that purpose, adjourn the hearing and remit the case to the court that made the order.
 - (4) Where, at a hearing under this section, the person who was served with the summons or warrant does not appear or, having appeared, fails to satisfy the court that the order ought not to be confirmed, the court may confirm or enforce the order, either without modification or with such modifications as the court, after hearing the evidence, considers just.
 - (5) Where an order has been confirmed under this section, it may be varied or rescinded in like manner as if it had originally been made by the confirming court; and where, on an application for rescission or variation, the court is satisfied that it is necessary to remit the case to the court that made the order for the purpose of taking further evidence, the court may so remit the case and adjourn the proceedings for the purpose.

(6) Where the court has declined to confirm an order or part of an order, or has varied or rescinded the order or part of the order, the person in whose favour the order was made and the Attorney General shall have a like right of appeal.

(7) An order confirmed under this section has, from the date of its confirmation, the same force and effect, and, subject to this Part, all proceedings may be taken on it, as if it had been an order originally obtained in the court in which it is so confirmed, and that court has power to enforce the order accordingly.

(8) Where an order sought to be confirmed under this section makes payable sums of money expressed in a currency other than the currency of Canada, the confirming court, or, where that court is the Supreme Court, the registrar of that court, shall determine the equivalent of those sums in the currency of Canada on the basis of the rate of exchange prevailing at the date of the provisional order of the court in the reciprocating state, as ascertained from any branch of any chartered bank; and the confirming court or the registrar, as the case may be, shall certify on the order when confirmed the sums so determined expressed in the currency of Canada, and the order when confirmed shall be deemed to be an order for the sums so certified.

(9) For the purposes of this Part, a maintenance order or a complaint made under reciprocal enforcement of support legislation may be treated as a maintenance order made provisionally where the respondent was neither served within the reciprocating state nor present or represented at a hearing in the reciprocating state.

Jurisdiction of a court

70.5 The court in which an order is registered or confirmed may enforce the order in accordance with this Part notwithstanding that it is an order in proceedings in which the court has no original jurisdiction or that it is an order that the court has no power to make in the exercise of its original jurisdiction.

Enforcement

70.6 (1) A court in which an order has been registered under this Part or by which an order has been confirmed under this Part, and the officers of the court, shall as soon as possible take all proper steps for enforcing the order, and the enforcement provisions of this Act apply to orders so registered or confirmed.

(2) For the purposes of showing default or arrears under an order, the court may accept in evidence an affidavit made by any person deposing to have knowledge of, or information and belief concerning, the facts.

(3) Where any proceedings are taken to register or enforce an order, it is not necessary to prove that the person against whom the order was made was served with the order.

Appeals

70.7 Where

- (a) a maintenance order made in a reciprocating state has been registered in the Province,
- (b) a court in the Province has, by its order, confirmed, or varied and confirmed, a provisional order made in a court of a reciprocating state, or
- (c) officers of a court in the Province have taken, or are about to take, steps to enforce an order so registered or a provisional order so confirmed,

any party to the matter may appeal against the registration or the confirming order or against the enforcement of the order; and this Act applies in respect of the enforcement of, variation of, or appeal from the registration, confirmation or variation of the maintenance order.

Transmission of documents

70.8 (1) Where under this Part a document is sent to the Attorney General for transmission to the proper officer of a reciprocating state, the Attorney General shall transmit the document accordingly.

(2) The designation of a court by the Attorney General for any purpose under this Part does not prevent the Attorney General from designating another court with respect to the same order.

Proof of documents

70.9 A document purporting to be signed by a judge or officer of a court in a reciprocating state shall, until the contrary is proved, be deemed to have been so signed without proof of the signature or judicial or official character of the person appearing to have signed it, and the officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to have been the proper officer of the court to sign the document.

Evidence

70.91 Statements signed by the applicant, or depositions or transcripts of evidence taken in a reciprocating state, may be received in evidence before the courts in the Province under this Part.

Where order is expressed in a language other than English

70.92 Where a maintenance order sought to be registered or confirmed under this Part is in a language other than the English language, the maintenance order or a certified copy of the maintenance order shall have attached to it, for all purposes of this Part, a translation in the English language approved by the court; and on such approval being given, the maintenance order shall be deemed to be in the English language.

Saving

70.93 Nothing in this Part deprives a person of the right to obtain a maintenance order instead of proceeding under this Part.

Reciprocating states

70.94 The Lieutenant Governor in Council may, for the purpose of this Part, declare a province of Canada or a state to be a reciprocating state.

PART 5

Scope of this Part

71. This Part governs Provincial Court proceedings under this Act other than proceedings for an offence.

Proceedings to be heard summarily

72. Subject to this Act and the regulations, an application under this Act to the Provincial Court shall be heard summarily or in the manner the court may direct.

Provincial Court rules

73. Subject to this Act and notwithstanding any other enactment, the Lieutenant Governor in Council may make rules governing

- (a) matters of practice, procedure, evidence or costs;
- (b) the making or amendment of applications;
- (c) the issuance of a summons, warrant or subpoena;
- (d) substituted service of court documents;
- (e) attendance at proceedings and adjournments;
- (f) notice of proceedings to third parties;
- (g) the circumstances in which a judge is seized of a matter or a proceeding may continue before another judge;
- (h) the posting of security or a bond;
- (i) the making of a court order requiring a person to report periodically to the court or to a person specified in the order;
- (j) dealings with money paid into or deposited with the court; or
- (k) any other matter

respecting Provincial Court proceedings under this Act.

Enforcement of agreement as court order

74. (1) In this section

"child" means a person under the age of 19 years who is acknowledged in a written agreement filed under this section to be the responsibility of a party to the agreement;

"parent" means a person who acknowledges in a written agreement filed under this section a responsibility for a child;

"spouse" means a husband or a wife and includes a person who acknowledges in a written agreement filed under this section that he is or was a spouse of another person, whether or not they are or were married.

(2) A provision respecting the

- (a) custody of, maintenance for or access to, a child by a parent; or
- (b) maintenance of a person by his spouse

contained in a written agreement made by a parent or by a spouse before or after March 31, 1979 is enforceable, subject to subsection (3), under this Act as if the provision were contained in an order made under this Act.

(3) No provision shall be enforced under subsection (2) unless

- (a) every person, except a child, against whom the provision is being enforced is a party to the written agreement;

- (b) every person, except a child, against whom the provision is being enforced completes, before a commissioner for taking affidavits under section 63, 67 or 68 of the Evidence Act, a consent in prescribed form; and
 - (c) a signed copy of the written agreement, and a signed copy of every consent under paragraph (b), are filed, before the application to enforce the provision is made, with the court.
- (4) A provision that is enforceable under this section may at any time be altered, varied or rescinded by
- (a) a new agreement entered into by the parties and filed in accordance with subsections (2) and (3); or
 - (b) the court, on application, in the same manner under this Act as an application for an alteration, variation or rescission of a like provision in an order of that court.
- (5) The filing of a written agreement under this section does not restrict or prohibit a court from making an order for the same relief as is provided for in the agreement.
- (6) Where a court, in enforcing a provision under subsection (2), orders that a payment is due or owing it shall order that the payment be made to the clerk of the court at the place in which the agreement is filed.
- (7) A written agreement filed under section 2 of the *Unified Family Court Act* before March 31, 1979 is a written agreement under this section.

PART 6

Abolished remedies

75. No action shall be maintained for restitution of conjugal rights, loss of consortium, criminal conversation or jactitation of marriage.

Damages and costs from adulterer

76. (1) A spouse may claim damages from a person who has committed adultery with his spouse.

(2) Where a proceeding under subsection (1) is joined with a proceeding for judicial separation or dissolution of marriage, the court may, where the alleged adultery is proved, order the adulterer to pay all or a part of the costs of the proceedings.

Temporary property relief

77. (1) An order under this section is for temporary relief pending determination of the rights to the property of the spouses by agreement or by a court having jurisdiction in those matters.

(2) A court may make an order under this section respecting property that is owned or leased by one or both spouses and is or has been

- (a) occupied by the spouses as their family residence; or
 - (b) personal property used or stored at the family residence.
- (3) On application, the court may order that one spouse for a stated period
- (a) be given exclusive occupancy of the family residence; or
 - (b) to the exclusion of the other spouse may use all or part of the personal property at the family residence.

(4) An order under subsection (3) does not authorize the spouse to materially alter the substance of the family residence or personal property. A spouse does not acquire a proprietary interest on the making of an order under this section.

(5) Subject to section 78, a right of a spouse to exclusive occupancy or use ordered under this section shall not continue after the rights of the other spouse, or of both spouses, as owner or lessee are terminated.

(6) Nothing in this section prevents the filing of an entry under the *Land (Wife Protection) Act*.

Postponement of sale

78. Where an order for exclusive occupancy or use has been made under section 77, the Supreme Court, on application, may order that the rights of a spouse to apply for partition and sale or to sell or otherwise dispose of or encumber the property be postponed and be subject to the right of exclusive occupancy or use and may, in its order, vary the order made under section 77.

Restriction of contact

79. (1) A court may, on application, order that, while the spouses continue to live separate and apart, one spouse shall not enter premises while the premises are occupied by the other spouse or a child in the custody of the other spouse.

(2) Subsection (1) applies whether or not the spouse against whom the order is made owns or has a right to possession of the premises.

Responsibility for debts of former spouse

80. (1) After a court makes absolute a decree of divorce, or makes an order for judicial separation, or declares a marriage to be null and void, each former husband or wife, subject to this Act

- (a) shall be considered an unmarried person in respect of property, the right to contract, and rights and obligations in civil proceedings; and
- (b) is not, except where the liability arose during marriage, liable for a contract the other enters into, or for a wrongful act or omission by the other, or for costs incurred by the other in a proceeding.

(2) Notwithstanding subsection (1), where a person is in arrears under an order for alimony or support and maintenance, the person is also liable to a third person for necessities supplied by the third person to a child or former husband or wife who is the beneficiary under the order.

Offences

81. (1) A person commits an offence by refusing or neglecting, without reasonable excuse, to comply with an order made against him under sections 37, 77 or 79.

(2) A person who, without lawful excuse, interferes with the custody of, or access to, a child in respect of whom the custody or access was awarded to another person under this Act commits an offence.

(3) An order, certified by a proper officer of the court that made the order, is proof of the order in a prosecution under this section.

Regulations

82. The Lieutenant Governor in Council may make regulations.

Transitional

83. (1) An order or agreement made or filed under an enactment repealed by this Act continues, in so far as it is not inconsistent with this Act, to be valid and enforceable, and may be rescinded, varied, enforced or otherwise dealt with under this Act.

(2) Where an enactment, regulation, order or other document mentions or refers to an enactment repealed by this Act, the mention or reference shall be deemed to be to this Act.

(3) Where an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, is made on or before March 31, 1979, section 8 of the *Family Relations Act*, S.B.C. 1972, c. 20, applies to the spouses and their property notwithstanding the repeal of that section.

(4) Any proceeding taken or order, declaration or designation made or any other thing done under or for the purpose of Part 2 of the *Family Relations Act* Rules and Regulations, published as B.C. Reg. 141/79, shall be conclusively deemed to have been taken, made or done under Part 4.1 of this Act.

Retroactivity

84. This Act is retroactive to the extent necessary to give effect to its provisions.

APPENDIX B

Division of Property Chart

A. Introduction

The Division of Property Chart is intended to illustrate graphically the uncertainty facing spouses who resort to the courts to settle the division of family property upon marital breakdown. The cases are organized according to the duration of marriage, ranging from a few months to many years. The presumption under the *Family Relations Act* is that there is to be an equal division of property upon marital breakdown. An equal division might not be fair in the circumstances of a given case. Under section 51 the courts have a discretionary power to adjust the division of assets where equal shares would be unfair. The circumstances of each particular marriage have a bearing on the determination of a fair division.

It is not possible to predict the outcome of litigation concerning the division of property. The most that can be said is that certain factors are consistently relied upon when determining an appropriate division of property. These factors are discussed elsewhere in this Study Paper and will be commented on only very briefly here.

B. Methodology

Some comment on the methodology employed in compiling this chart is useful to an understanding of it.

The collection of cases presented in the chart is not the result of a structured (eg. random) sampling technique. Rather, most, but not all, of the cases discussed or referred to in this Study Paper are represented in the chart. To be included, the case or case digest must have provided at a minimum, information regarding the duration of the marriage and the division of property. Cases not cited in the Study Paper are not represented in this chart.

Care has been taken to refer to reported decisions, but some cases, at the time this chart was prepared, were not reported. A significant number of the case citations are to the case digests of these unreported decisions. To the extent that case digests have been relied upon the information provided in the chart may not be wholly reliable or complete.

A substantial effort has been made to ensure the accuracy of the information provided. Frequently the reasons for judgment or the abstract will not easily disclose the information provided on this chart. The judge may discuss the circumstances in a given case and reapportion the assets without specifically citing the particular subsections of section 51 which are being considered or applied. Whether a particular subsection has been considered ("C") or applied ("A") in a given case will often require some judgment by the researcher. The percentage division is not always specified and may require computation of the monetary value of assets awarded to each spouse and then translation into percentages. As well, the date selected for valuation of the assets is frequently not discussed, though close scrutiny may suggest the values stated are as of the date of trial, separation, or some other date.

In light of the foregoing the reader is advised to exercise caution in drawing inferences from the Chart.

C. The Division of Property Chart

1. Duration of Marriage

The period indicated under this heading is calculated from the date of marriage to the date of separation, not to the date of divorce. Most of the judgments under the *Family Relations Act* are concerned with the duration of cohabitation during marriage. The period of cohabitation is relevant for two reasons. First, an asset may be deemed to be a family asset by virtue of its use for a family purpose during the marriage. Second, an asset may be a family asset by virtue of some direct or indirect contribution of the non-owning spouse. Generally, assets acquired after separation will neither have been used for a family purpose nor contributed to by a non-owning spouse. There are, however, exceptions to this general rule which are discussed elsewhere in this Study Paper. Cohabitation prior to marriage is generally given some weight in looking at the circumstances of an individual case. Where this is a factor it is noted in brackets below the time listed for the duration of the marriage.

2. Section 43

Section 43 provides a statutory presumption of an equality of interest in family assets upon the occurrence of a "triggering event" signifying marriage breakdown. This equality of interest is subject to reapportionment under section 51. In some cases the court will consider certain section 51 factors and decide that there is no basis to vary the statutory equality. These cases are noted by "A" (applied) under the "S. 43 Equal Interest" heading. In a number of cases the courts will grant equal division of the assets, stating that although various section 51 factors are

applicable, they balance each other out. In these cases the presumption of equality has not been applied. Cases where the court has granted an equal division but has selected a valuation date other than the date of the trial represent an alternative method of reapportioning the assets, again in which the presumption of equality has not been applied. Additionally, there are a significant number of cases where each spouse is awarded an equal interest in family assets, but an unequal interest in business assets deemed to be family assets. It would be misleading to suggest that the presumption in favour of equal shares was applied in these cases.

The reader should not be misled by the fact that the majority of cases cited in this chart do not result in equal shares of property. The method of sampling the cases does not warrant any statistical conclusions being drawn.

3. Section 51 Factors Considered

"C" - denotes that this factor received comment or was *considered* but that it was given little or no weight with respect to reapportioning the family assets.

"A" - denotes this factor was given weight and *applied* in the reasons given for reapportionment of the family assets.

Section 51 permits the courts to vary the statutory equality of interest where it would be unfair having regard to the enumerated factors. Few general principles may be laid down. The following observations are intended to assist the reader in interpreting the chart.

- i. Section 51(a) (duration of marriage) is frequently but not always applied where the marriage is of short duration. The trend appears to be that the shorter the marriage, the more likely this factor will justify reapportioning entitlement. Frequently this factor is applied in combination with 51(c) or 51(f) in favour of the owning spouse. This reflects a conclusion that equal division of property would often be unfair where one spouse has brought substantial assets to the marriage.
- ii. Section 51(b) (duration living separate and apart) is seldom taken into specific consideration. Instead the courts often refer to the duration of cohabitation which is in effect the duration of the marriage less the duration living separate and apart. In some cases, 51(b) is applied where there is a significant change in the value of the assets after the separation. In applying 51(b) the courts will often choose a valuation date other than the date of trial. However, on occasion the courts have applied 51(b) and reapportioned entitlement, valued at the date of trial.
- iii. Section 51(c) (date when property was acquired or disposed of) is often applied where one spouse has brought substantial assets into the marriage. As noted previously, this factor is most commonly applied when the marriage is of short duration (less than 10 years). 51(c) is also applied on occasion where one party has disposed of assets either before or after separation with the intention of defeating the non-owning spouse's interest. The court may also employ 52(2)(c) or 52(3) in these circumstances.
- iv. Section 51(d) (property acquired through inheritance or gift) generally appears to be given little weight by the courts in relation to reapportioning assets. Where it has been considered ("C") the courts will often find that the gift to a spouse during marriage was intended as a gift to both spouses. Where it has been applied ("A") in the cases surveyed, other factors have also been applied in combination to reapportion entitlement to family assets. As a rule of thumb, where an inheritance or gift is found to be a family asset, the longer the period of time during which the asset has been used in the marriage, the less likely this factor will be given weight. There are a number of cases where inheritances or gifts are not found to be family assets and 51(d) does not come into operation. The chart will not reveal these cases.
- v. Section 51(e) (need for economic self sufficiency) is frequently applied by the courts, by itself or in combination with other factors. Generally, it appears to be applied where the income levels of the spouses, present or anticipated, are disparate. Custody of children by the lower income earner frequently appears to be given weight. Additionally, there appears to be a significant relationship between the application of this factor and the award of maintenance. For example, where the court anticipates a spouse will default on maintenance or child support, 51(e) may be applied, or the court may award lump sum maintenance.
- vi. Section 51(f) (any other circumstances. . .) is now commonly applied in reapportioning family assets to bring about an appropriate division. Prior to 1981 this factor appears to have been narrowly construed and rarely applied.
The contribution of a spouse, to the acquisition, preservation or maintenance of assets is frequently considered under this heading. This factor is usually applied where one spouse has maintained the family assets for a lengthy period of time following separation. As well this factor is applied where a "venture" under s. 45(3)(e) or a business asset under subsection 46(2) is deemed to be a family asset.
Frequently 51(e) and 51(f) are applied to allow a non-owning spouse with economic

needs to receive some share of the business assets. However, in a number of cases, business assets are held not to be family assets and the non-owning spouse receives no interest. This occurs in both short and long marriages and reflects the different lines of authority concerning contribution required to transform a business asset into a family asset. This is discussed in detail elsewhere in this Study Paper.

vii. *Other*

In a number of cases, factors other than those noted in section 51 appear to be relevant to the division. These other factors in some cases might be subsumed under 51(e) or 51(f). For example, the presence of children is on occasion noted as a significant factor. This could be subsumed under 51(e), relating to the need of the spouse with custody to have economic independence. Similarly, a few cases find that a constructive trust exists and apply this factor in relation to some assets. This factor could perhaps be subsumed under 51(f). The symbols provided in the "Other" category are as follows:

- CT - constructive trust
- SA - separation agreement
- D - divorce
- M - marriage
- R - reconciliation
- S - separation

s. 54- section 54 of the *Family Relations Act*

- A - other (this may include the presence of children or some other factor given weight in the reapportionment)

4. Distribution of Assets

The chart notes the percentage allocation each spouse respectively received of the family assets and the business assets. The wife's share is noted first, followed by the husband's. In the category of "Busi. Assets" most often the share is given as "0/100" or "100/0". This indicates that the business assets were found not to be family assets. There is the occasional exception to this general rule. Conversely, where each spouse has received a share, eg., "20/80" or "80/20" this indicates that the business assets were deemed to be family assets.

On occasion the courts have set out different categories of assets and awarded varying interests in each category. Where this is so, two or more percentage allocations will be noted on the chart.

Where possible the monetary value of the assets being divided is noted for both family assets and business assets (whether or not they are found to be family assets). Where no value is determinable, key words may be entered: eg. mat. home (matrimonial home). Where there are a variety of assets but insufficient information as to their value a "?" has been entered.

5. Maintenance

Frequently cases provide no information regarding the issue of maintenance or child support. The division of property is a separate issue from maintenance. The courts, however, often examine the two together and the division of property in many cases appears to be influenced by considerations respecting maintenance and child support. For these reasons, this category has been included in the chart. The following symbols are used:

- nd - not discussed in the case or digest cite noted.
- nil - maintenance application but no maintenance awarded.
- 3 yrs- eg. where a time period is indicated, the court has awarded maintenance for a set period, generally subject to review at expiry.
- I - indefinite maintenance awarded, subject to review in the event of a change in circumstances.
- LS - lump sum maintenance awarded.
- CS - child support awarded to the custodial parent.
- R - referred to the Registrar.

Valuation Date

The *Family Relations Act* does not specify the valuation date to be employed when dividing family assets. The general rule which has developed is that the date of the trial or hearing to divide the assets is the appropriate date to value the assets. In a large number of cases the trial date will be the same as the "triggering event." However, the court has the discretion to choose any other date where it would be "unfair" to value the assets at the date of trial.

In many decisions the valuation date is not disclosed. Where this is so "nd" is entered, indicating that valuation was not discussed.

The date of the hearing or trial is the most frequently cited date. This is denoted by "T" in the chart. A "T" may also indicate that the parties have agreed on the value prior to the trial.

Similarly, where the court has divided an asset into shares, eg. the matrimonial home, but postponed the order for sale, a "T" is also entered. This reflects the researcher's assumption that the judge is dividing the asset based on the value at the time of the trial.

In a number of cases, the court will choose a date other than the time of trial. The following symbols are used:

- T - date of hearing or trial to divide the assets.
- D - value at the date of divorce.
- S - value at the date of final separation.
- DM - value at date of dissolution of marriage.
- DN - value at date of *decree nisi*.
- SA - value at date of separation agreement.
- ? - other valuation date.
- nd - valuation date not discussed in the case report or disclosed in the digest abstract.

Division of Property Chart - Legend

Section 51 Factors Considered

- C - considered but little or no weight given.
- A - considered and applied in reasons for reapportionment.
- Other:
 - CT - constructive trust
 - SA - separation agreement
 - D - divorce
 - M - marriage
 - R - reconciliation
 - S - separation
 - s. 54 - section 54 of *Family Relations Act*
 - A - other (this may include the presence of children or some other factor given weight in the reapportionment)

Distribution of Assets W/H

Eg. 10/90 - 10 % to wife 90% to husband

Note: The percentage allocation to the wife is always noted first.

Maintenance

- nd - not discussed in the case or digest cite noted.
- nil - maintenance argued but no maintenance awarded.
- (eg) 3 yrs- where a time period is noted, the court has set a limit to the maintenance, subject to review at expiry.
- I - indefinite maintenance awarded, subject to a review with a change in circumstance.
- LS - lump sum maintenance awarded.
- CS - child support awarded to the custodial parent.
- R - referred to the Registrar.

Valuation Date

- T - value at date of hearing or trial to divide the assets.
- D - value at date of divorce.
- S - value at date of separation.
- DM- value at date of dissolution of marriage.
- DN - value at date of *decree nisi*.
- SA - value at date of separation agreement.
- ? - other valuation date.
- nd - valuation date not discussed in the case report or disclosed in the digest abstract.

DIVISION OF FAMILY PROPERTY CHART

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Main-tenance	Valua-tion Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value			
												Family Assets	Busi. Assets		
<i>Kramer v. Kramer</i> [1984] B.C.D. Civ. 1645-07 (S.C.)	2 mon.		A		C	C	C	C		4/96		73,250		nil	nd
<i>Bonke v. Bonke</i> (1984) 42 R.F.L. (2d) 72 (B.C.S.C.)	6 mon. (2 yrs. prior cohab)		A		A			A		0/100		Mat. home		LS 3 yrs.	nd
<i>Chau v. Tsang</i> (1982) 27 R.F.L. (2d) 187 (B.C.C.A.)	10 mon.		A					A		7/93		97,000		nd	T
<i>Artus v. Artus</i> [1985] B.C.D. Civ. 1676-03 (S.C.)	11 mon.		A				A	A		0/100		70-90,000		nd	nd
<i>Kirby v. McDonald</i> [1984] B.C.D. Civ. 1645-27 (S.C.)	11 mon.		A		A			A		90/10		75,000		CS I	nd
<i>Forbes v. Bowler</i> [1985] B.C.D. Civ. 1645-06 (S.C.)	11 mon. (2.5 yrs. prior cohab)		A				A			90/10		75,000		nd	T
<i>McIntosh v. McIntosh</i> (1980) 20 R.F.L. (2d) 386 (S.C.)	11 mon. (7 yrs. prior cohab)								CT	33/66	33/66	105,000	88,000	nd	T
<i>Robertshaw v. Robertshaw</i> (No. 2), (1979) 17 B.C.L.R. 137 (1980) 2 W.W.R. 215 (S.C.)	1 yr.		A		A		A			10/90	0/100	120,000	?	1 yr.	T
<i>McKelvie v. McKelvie</i> (1982) 29 R.F.L. (2d) 446 (S.C.)	1 yr. (3.5 yrs. prior cohab)		A							20/80		Mat. home		nd	T

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Main-tenance	Valua-tion Date	
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value				Busi. Assets
												Family Assets	Busi. Assets			
<i>James v. James</i> [1982] B.C.D. Civ. 1645-02 (S.C.)	1 yr. 6 mon.		A							10/90 90/10		180,000 10,000			nd	T
<i>Heaps v. Heaps</i> (1981) 20 B.C.L.R. 382, 17 R.F.L. (2d) 119 (S.C.)	1 yr., 9 mon.		A	C					A		33/66		Mat. home		nil	D
<i>Newman v. Newman</i> [1984] B.C.D. Civ. 1648-01 (S.C.)	1 yr. 11 mon.		A									0/100		183,000	nd	T
<i>McCleery v. McCleery</i> (1983) 46 B.C.L.R. 120 (S.C.)	2 yrs.		A						A		30/70	0/100 30/70	250,000	?	nil	nd
<i>Sleightholme v. Sleightholme</i> [1982] B.C.D. Civ. 1654-03 (S.C.)	2 yrs.		C						A		55/45		Mat. home		nd	nd
<i>Froh v. Froh</i> [1981] B.C.D. Civ. 1656-04 (S.C.)	2 yrs.		C	C					A		55/45		Mat. home		nd	T
<i>Fries v. Fries</i> [1983] B.C.D. Civ. 1654-01 (S.C.)	2 yrs.		A					A	A		20/80		66,500		nil	T
<i>Uram v. Uram</i> (1983) 35 R.F.L. (2d) 82 (B.C.C.A.)	2 yrs. (2 yrs. prior cohab)		C					A			50/50	10/90	242,000	875,000	CS 3 yrs.	T
<i>Ho v. Ho</i> [1982] B.C.D. Civ. 1640-15 (S.C.)	2 yrs. (5 yrs. prior cohab)		A						A		50/50	72/25	Mat. home	50,000	nd	T
<i>Atterton v. Atterton</i> [1981] B.C.D. Civ. 1644-01 (S.C.)	2 yrs. (prior cohab?)	A	C					C	C		50/50		65,000		nil	D

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Main-tenance	Valua-tion Date
											Family Assets W/H	Busi. Assets W/H	Monetary Value			
													Family Assets	Busi. Assets		
<i>Burnham v. Burnham</i> (1980) 21 R.F.L. (2d) 139 (B.C.S.C.)	2 yrs. (2 yrs. prior cohab)	A								CT	50/50		8,000		CS	S
<i>Stammler v. Stammler</i> (1979) 14 B.C.L.R. 57, 11 R.F.L. (2d) 83 (S.C.)	2 yrs., 6 mon.		A		A						12/88	0/100	60,000	85,000	nil	T
<i>Johnson v. Johnson</i> [1984] B.C.D. Civ. 1654-05 (C.A.)	3 yrs.	A	C	C					C		50/50		Mat. home		nd	T
<i>Girard v. Girard</i> (1983) 42 B.C.L.R. 305 (C.A.)	3 yrs.		A						A		33/66		47,000		nd	T
<i>Mitchell v. Mitchell</i> [1981] B.C.D. Civ. 1664-06 (S.C.)	3 yrs.	A				C			C		50/50	0/100	Mat. home	?	nd	T
<i>Barnes v. Barnes</i> [1981] B.C.D. Civ. 1645-13 (S.C.)	3 yrs.		A		A			A	A		66/33		30,000		nd	S
<i>Deane v. Cunningham</i> [1985] B.C.D. Civ. 1654-01 (S.C.)	3 ? yrs.	A	C					C	C		50/50		7,000		3 yrs.	T
<i>Young v. Young</i> (1981) 20 R.F.L. (2d) 288 (S.C.)	3 yrs.		A	A	A			A	A		30/70		175,000		nd	T
<i>Sangster v. Sangster</i> (1984) 55 B.C.L.R. 251, 40 R.F.L. (2d) 31 (C.A.)	3 yrs. (8 yrs. prior cohab)		A					C	A		20/80	0/100	Mat. home	?	I	nd
<i>Robins v. Robins</i> [1983] B.C.D. Civ. 1643-01 (S.C.)	3 + yrs.		A						A		4/96		180,000		LS 6 mon.	T

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Main-tenance	Valua-tion Date
			Factors Considered								Distribution of Assets					
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value Family Assets	Busi. Assets			
<i>Derrymann v. Derrymann</i> [1984] B.C.D. Civ. 1654-12 (S.C.)	3 yrs., 4 mon.		C						A		60/40		Mat. home		nd	nd
<i>Donald v. Donald</i> (1981) 28 B.C.L.R. 240 (S.C.)	3 yrs., 5 mon.		A							SA D M	25/75		64,000?		I	nd
<i>Callison v. Callison</i> [1985] B.C.D. Civ. 1647-01 (S.C.)	3 yrs., 5 mon.		A		A			A			20/80		125,000		I	nd
<i>Arsens v. Arsens</i> (1980) 25 B.C.L.R. 128 (S.C.)	3 yrs., 5 mon. (1 yr. prior cohab)		C			C	A	A	A		100/0		57,000		I	T
<i>Levesque v. Freed</i> [1983] B.C.D. Civ. 1640-04 (S.C.)	3 yrs., 5 mon.		C					A	C		50/50	30/70	Mat. home	60,000	nd	T
<i>Hunt v. Hunt</i> (1981) 27 B.C.L.R. 134 (S.C.)	3 yrs., 6 mon.		A		A				A		40/60 25/75 75/25		55,000		nd	T
<i>Nicolette v. Nicolette</i> [1985] B.C.D. Civ. 1645-01 (S.C.)	3 yrs., 6 mon.		A		A			C	C		75/25 25/75		9,000 196,000		nd	nd
<i>Connor v. Connor</i> [1982] B.C.D. Civ. 1647-03 (S.C.)	3 yrs., 6 mon.		A					C	A		20/80		Mat. home		nd	T
<i>McCann v. McCann</i> [1981] B.C.D. Civ. 1647-06 (S.C.)	3 yrs., 6 mon.	A	C						C		50/50		60,000		nd	?
<i>Duncan v. Duncan</i> (1984) 42 R.F.L. (2d) 66 (B.C.C.A.)	4 yrs.		A			A					20/80		67,000		nd	T

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Maintenance	Valuation Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value			
												Family Assets	Busi. Assets		
<i>Jensen v. Jensen</i> [1983] B.C.D. Civ. 1654-03 (S.C.)	4 yrs.		A		A		A	A		66/33		12,500		nd	S
<i>Zaurini v. Zaurini</i> (1981) 33 B.C.L.R. 15, 22 R.F.L. (2d) 161 (C.A.)	4 yrs.		A		A			A		15/85		Mat. home		nd	
<i>Read v. Read</i> [1983] B.C.D. Civ. 1645-12 (S.C.)	4 yrs.		C	A			A			70/30		88,688		CS	T
<i>Piskor v. Piskor</i> (1981) 27 B.C.L.R. 230, 22 R.F.L. (2d) 257 (C.A.)	4 yrs. (5 yrs. Prior cohab)		A	A	C	C	C	A		40/60		27,350		nd	T
<i>Douglas v. Douglas</i> (1984) 43 R.F.L. (2d) 262 (S.C.)	4 yrs., 6 mon.		C				A	A		33/66		75,000		I CS	T
<i>Strain v. Strain</i> [1984] B.C.D. Civ. 1643-02 (S.C.)	4 yrs., 6 mon.		A					A		90/10		77,000		nd	T
<i>Kirby v. MacDonald</i> [1984] B.C.D. Civ. 1645-27 (S.C.)	4-5 yrs. (6 yrs. prior cohab)		C					A		75/25		111,145		CS I	T
<i>Forster v. Forster</i> (1981) 24 R.F.L. (2d) 99 (B.C.S.C.)	4 yrs., 8 mon.		C		A			A		? 1/99		Mat. home		nil	nd
<i>Wood v. Wood</i> (1980) 17 R.F.L. (2d) 72 (S.C.)	5 yrs.	A	C			C		C		50/50		50,000		LS CS	T
<i>Haaf v. Haaf</i> [1981] B.C.D. Civ. 1645-16 (S.C.)	5 yrs. (8 yrs. prior cohab)	A	A	C						50/50		21,200		I	D.M.

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Maintenance	Valuation Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value			
												Family Assets	Busi. Assets		
<i>Woff v. Woff</i> (1980) 20 R.F.L. (2d) 218 (B.C.S.C.)	5 yrs. (3 yrs. prior cohab)		A						A	30/70		92,000		nd	T
<i>Wangler v. Wangler</i> [1984] B.C.D. Civ. 1654-10 (S.C.)	5 yrs. (3 yrs. prior cohab)		A		A				A	40/60		Mat. Home		nd	T
<i>Capozzi v. Capozzi</i> (1982) 30 R.F.L. (2d) 145 (B.C.S.C.)	5 yrs.		C	C					A	20/80	20/80	?	?	I	S
<i>Gretul v. Gretul</i> [1983] B.C.D. Civ. 1640-10 (S.C.)	5 yrs. +		C						A	50/50	?	?	?	LS	T
<i>Formosa v. Formosa</i> (1983) 37 R.F.L. (2d) 217 (B.C.C.A.)	5 yrs., 6 mon.	A	C	C	C				C	50/50		Mat. home		nd	nd
<i>Baird v. Baird</i> (1981) 33 B.C.L.R. 77, 25 R.F.L. (2d) 17 (C.A.)	5 yrs., 6 mon.	A	C					C	C	50/50		74,650		nd	T
<i>Zastowny v. Zastowny</i> [1984] B.C.D. Civ. 1645-14 (S.C.)	6 yrs. (4 yrs. prior cohab)	A	C	C	C				C	50/50		26,000		nd	S
<i>Baker v. Baker</i> [1984] B.C.D. Civ. 1645-11 (S.C.)	6 yrs. (3 yrs. prior cohab)		A	A	A				A	80/20		79,000		R	T
<i>Fuller v. Fuller</i> (1982) 36 B.C.L.R. 237 (S.C.)	6 yrs.		C	A					A	50/50		60,000		nd	DN

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered										Distribution of Assets				Valuation Date
			Factors Considered										Monetary Value			Main-tenance	
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Family Assets	Busi. Assets				
<i>Kropacek v. Kropacek</i> (1982) 36 B.C.L.R. 296 (S.C.)	6 yrs. (3 yrs. prior cohab)	A	C				C	C				50/50	?		nil	S	
<i>Worobieff v. Worobieff</i> (1980) 19 B.C.L.R. 241, 109 D.L.R. (3d) 179 (S.C.)	7 yrs.		C	A			A	A	A			1/99	Mat. home		nd	T	
<i>Sokalofsky v. Sokalofsky</i> [1984] B.C.D. Civ. 1654-11 (S.C.)	7 yrs.		C	C				A	A			90/10	90,000		nd	T	
<i>Murray v. Murray</i> (1979) 11 B.C.L.R. 338 (S.C.)	7 yrs.		C					C				50/50	15,800		nd	S	
<i>Pacey v. Pacey</i> [1981] B.C.D. Civ. 1654-17 (S.C.)	7 yrs.		A	A	A		A	A	A	R S.A.		90/10	105,000		I	T	
<i>La Rue v. La Rue</i> [1982] B.C.D. Civ. 1654-02 (S.C.)	7 yrs., 6 mon.		A					C	A			66/34	275,000		nd	T	
<i>Hackett v. Hackett</i> (1984) 43 R.F.L. (2d) 5 (B.C.S.C.)	8 yrs.		C					A		CT		50/50 66/33	123,000		nil	T	
<i>McLennan v. McLennan</i> (1980) 20 B.C.L.R. 193 (S.C.)	8 yrs.		C	A	A		C	A				30/70	205,000	107,000	nil	T	
<i>Stewart v. Stewart</i> (1984) 56 B.C.L.R. 375 (C.A.)	8 yrs.		A		A			A				30/70	150,000	260,000 18 mon.		T	
<i>McDougall v. McDougall</i> (1982) 39 B.C.L.R. 88, 29 R.F.L. (2d) 274 (S.C.)	9 yrs.		C		A			A				10/90 20/80 50/50	47,300 202,500 133,000	111,072	I	T	
<i>England v. England</i> [1980] B.C.D. Civ. 1647-31 (S.C.)	9 yrs.		C	A	A			A				40/60	69,000	- 20,000	nd	T	

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Maintenance	Valuation Date
			Factors Considered								Family Assets W/H	Busi. Assets W/H	Monetary Value			
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets			Busi. Assets			
<i>Wiebe v. Wiebe</i> (1983) 33 R.F.L. (2d) 62 (B.C.S.C.)	9 yrs.		C	A			C	A			25/75		120,000		nd	T
<i>Collins v. Collins</i> [1982] B.C.D. Civ. 1640-08 (S.C.)	9 yrs.		C					A			50/50	33/66	41,600	54,000	nd	nd
<i>MacWilliam v. MacWilliam</i> [1983] B.C.D. 1664-07 (S.C.)	9 yrs.		C					A	A		60/40		50-60,000		I CS	T
<i>McCuaig v. McCuaig</i> (1983) 34 R.F.L. (2d) 453 (B.C.S.C.)	10 yrs.		A				A	A	SA		25/75		33,000		nd	S
<i>Jirik v. Jirik</i> (1983) 37 R.F.L. (2d) 385 (B.C.S.C.); (1984) 40 R.F.L. (2d) 79 (B.C.S.C.)	10 yrs.	A									50/50	0/100	Mat. home	?	I	nd
<i>Sweetin v. Sweetin</i> (1984) 39 R.F.L. (2d) 458 (B.C.C.A.)	10 yrs.	A	C	C			C	C			50/50		Mat. home		nd	nd
<i>Dresen v. Dresen</i> (1979) 13 R.F.L. (2d) 97 (S.C.)	10 yrs.		C				A	A			40/60 50/50		90,000		CS nil	S
<i>Roney v. Roney</i> (1981) 31 B.C.L.R. 121, 24 R.F.L. (2d) 315 (S.C.)	10 yrs.		C	A			A	A			22/78		40,800		nd	DM
<i>Malhotra v. Malhotra</i> (1983) 49 B.C.L.R. 8, 37 R.F.L. (2d) 310 (C.A.)	10 yrs.		C		C		A	C			75/25		128,000		nd	T
<i>Temple v. Temple</i> [1983] B.C.D. Civ. 1664-09 (S.C.)	10 yrs.		C								60/40		95,900		R	T
<i>Mayuk v. Mayuk</i> (1980) 25 B.C.L.R. 57 (S.C.)	11 yrs.		C	A	A	A	C					25/75		180,000	nd	T
<i>Timmins v. Timmins</i> (1985) B.C.D. Civ. 1656-01 (C.A.)	11 yrs.		C		A		A	A			75/25		Mat. home		nd	T

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered										Distribution of Assets			Maintenance	Valuation Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value Family Assets	Busi. Assets				
<i>Cross v. Cross</i> [1982] B.C.D. Civ. 1664-02 (S.C.)	11 yrs.		C				A			66/33		42,000				I CS	nd
<i>Takacs v. Takacs</i> [1982] B.C.D. Civ. 1640-01 (S.C.)	12 yrs.		C		C		A			60/40	0/100	Mat. home	?			nd	nd
<i>Murchie v. Murchie</i> (1984) 39 R.F.L. (2d) 385 (B.C.C.A.)	12 yrs.	A	C		C			C		50/50	50/50	561,000	126,000			R	S
<i>Exner v. Exner</i> [1983] B.C.D. Civ. 1640-11 (S.C.)	12 yrs.		C				A	A			25/75		61,000			CS	T
<i>Bawinheimer v. Bawinheimer</i> (1984) 56 B.C.L.R. 25 (B.C.S.C.)	12 yrs.		A					A	R S	20/80		135,000				nd	T
<i>Carr v. Carr</i> (1982) 30 R.F.L. (2d) 63 (B.C.S.C.)	12 yrs.		C				A	A		50/50	15/85	58,000	64,000			I	T
<i>Eddy v. Eddy</i> (1981) B.C.D. Civ. 1664-04 (S.C.)	12 yrs.	A	C				C	C		50/50		66,000				I	nd
<i>Jarvis v. Jarvis</i> (1979) 14 B.C.L.R. 324, 14 R.F.L. (2d) 1 (S.C.)	12 yrs.	A								50/50		54,000				I	T
<i>Krug v. Krug</i> (1982) 30 R.F.L. (2d) 176 (B.C.S.C.)	12 yrs., 6 mon.		C				A			65/35		48,000				LS I	T
<i>Gharibians v. Gharibians</i> [1983] B.C.D. Civ. 1640-05 (S.C.)	13 yrs.	A							SA		50/50		?			nd	S
<i>Borsato v. Borsato</i> [1985] B.C.D. Civ. 1671-01 (S.C.)	13 yrs.		C				A			40/60		185,000				nd	T
<i>Money v. Money</i> (1982) 33 B.C.L.R. 280, 27 R.F.L. (2d) 80 (S.C.)	13 yrs.		C	A			A	A			45/55		600,000 ?			nd	DN

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Main-tenance	Valua-tion Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value			
												Family Assets	Busi. Assets		
<i>Trebra-Lindeneau v. Trebra-Lindeneau</i> [1982] B.C.D. Civ. 1647-11 (S.C.)	14 yrs.	A	C			C	C			50/50		Mat. home		I	T
<i>Simpkins v. Simpkins</i> (1981) 30 B.C.L.R. 340, rev'd (1982) 41 B.C.L.R. 75 (C.A.)	14 yrs.		C			A	A			80/20	0/100	5,500 +	357,000	I	T
<i>Wilgosh v. Wilgosh</i> [1983] B.C.D. Civ. 1654-08 (S.C.)	14 yrs., 6 mon.		C				A	A		100/0		10,000		nil	nd
<i>Newson v. Newson</i> (1984) 42 R.F.L. (2d) 278 (B.C.S.C.)	14 yrs., 6 mon.		C		A		A	A		75/25		300,000		I	T
<i>Bulich v. Bulich</i> [1982] B.C.D. Civ. 1649-01 (S.C.)	15 yrs.	A	C			C				50/50		Mat. home		R	T
<i>Schlatter v. Schlatter</i> (1982) 41 B.C.L.R. 278, 32 R.F.L. (2d) 119 (C.A.)	15 yrs.	A	C							50/50	0/100	86,000	?	nd	T
<i>Jones v. Jones</i> [1982] B.C.D. Civ. 1680-04 (S.C.)	15 yrs.		A						SA	50/50		49,000		LS	nd
<i>Kury v. Kury</i> (1980) B.C.D. Civ. 1647-19 (S.C.)	15 yrs.		C	A				A		50/50		Mat. home		nil CS	nil
<i>Vance v. Vance</i> [1981] 6 W.W.R. 431, 23 R.F.L. (2d) 397 (B.C.S.C.)	16 yrs.	A	C	C		C	C			50/50	50/50	206,000	190,000 +	I	T
<i>Haitras v. Haitras</i> [1983] B.C.D. Civ. 1664-02 (S.C.)	16 yrs.		C				A		A	75/25		100,000		CS nil	T
<i>Birnie v. Birnie</i> [1980] B.C.D. Civ. 1647-30 (S.C.)	16 + yrs.		C				A		A	66/33		Mat. home		?	T
<i>Payrits v. Payrits</i> (1982) 26 R.F.L. (2d) 300 (B.C.S.C.)	17 yrs.		C	C			A		A	99/1		94,000		nil	T

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Main-tenance	Valua-tion Date
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value				
												Family Assets	Busi. Assets			
<i>Grange v. Grange</i> , (1982) 30 R.F.L. (2d) 432 (B.C.S.C.)	17 yrs.		C			A		A		50/50	40/60	490,000	?	nd	T	
<i>Carson v. Carson</i> [1984] B.C.D. Civ. 1645-12 (S.C.)	17 yrs.		C			C	A			55/45		300,000		nd	T	
<i>Hanuse v. Hanuse</i> (1984) 40 R.F.L. (2d) 250 (S.C.)	17 yrs.	A	C		C	C	C			50/50	50/50	876,000	?	nil CS	T	
<i>Murphy v. Murphy</i> (1984) 44 R.F.L. (2d) 60 (S.C.)	17 yrs.		C			C	A	A		60/40		54,000		I	T	
<i>Hauptman v. Hauptman</i> (1981) 32 B.C.L.R. 119 (S.C.)	17 yrs.	A					C			50/50		?		I	T	
<i>Tsonas v. Tsonas</i> [1985] B.C.D. Civ. 1654-04 (S.C.)	17 yrs.		C				C	A		25/75		105,000		nd	T	
<i>Day v. Day</i> (1981) 23 R.F.L. (2d) 93, 29 B.C.L.R. 363 (S.C.)	17 yrs.		C				A	A	A	99/1		57,000		nil	T	
<i>Johnstone v. Johnstone</i> (1981) 33 B.C.L.R. 308, 26 R.F.L. (2d) 18 (S.C.)	17 yrs.		C					A		75/25	100/0	1,800,000	?	nil	T	
<i>Peters v. Peters</i> [1981] B.C.D. Civ. 1645-09 (S.C.)	18 yrs.		C				A			35/65		100,000		nd	T	
<i>MacDonald v. MacDonald</i> (1981) 27 B.C.L.R. 247 (S.C.)	18 yrs.		C					A			20/80		515,000	nd	T	
<i>Jasich v. Jasich</i> (1984) 40 R.F.L. (2d) 441 (B.C.S.C.)	18 yrs.	A	C							50/50	0/100	400,000	?	1 yr.	T	
<i>Geck v. Geck</i> [1981] B.C.D. Civ. 1664-09 (S.C.)	19 yrs.	A	C							50/50		Mat. home		I	T	

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered										Distribution of Assets				Main-tenance	Valua-tion Date
													Family Assets W/H	Busi. Assets W/H	Monetary Value			
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets	Busi. Assets							
<i>Martelli v. Martelli</i> (1981) 26 R.F.L. (2d) 1 (B.C.C.A.)	19 yrs.		C	A								50/50		Mat. home		nd	S	
<i>Scobie v. Scobie</i> [1981] B.C.D. Civ. 1645-01 (S.C.); aff'd (1982) 28 R.F.L. (2d) 319 (B.C.C.A.)	19 yrs.		C				A					60/40		80,400		nd	T	
<i>Koch v. Koch</i> [1980] B.C.D. Civ. 1664-13 (S.C.)	19 yrs.	A										50/50		Mat. home		nd	T	
<i>Mirus v. Mirus</i> (1980) 19 B.C.L.R. 193, 15 R.F.L. (2d) 152 (S.C.)	19 yrs.		A								SA s. 54	100/0	16/84	82,000	950,000	nd	SA	
<i>Johnson v. Johnson</i> (1981) 30 B.C.L.R. 115, 24 R.F.L. (2d) 70 (S.C.)	20 yrs.	A					C	C				50/50	0/100	350-400,000	?	LS	T	
<i>Kirk v. Kirk</i> (1981) 22 R.F.L. (2d) 360 (B.C.S.C.)	20 yrs.		C			C	A	A				75/25		120,000		nil	T	
<i>Zarychia v. Zarychia</i> [1985] B.C.D. Civ. 1645-03 (S.C.)	20 + yrs.		C	C			A					60/40		Mat. home		nd	T	
<i>Richardson v. Richardson</i> (1984) 43 R.F.L. (2d) 312 (B.C.S.C.)	21 yrs.	A				C	C					50/50		Mat. home & 380,000		nd	T	
<i>Fumo v. Fumo</i> [1984] B.C.D. Civ. 1654-13 (S.C.)	21 yrs.		C				A		A			80/20		92,500		CS LS	T	
<i>Leung v. Leung</i> [1983] B.C.D. Civ. 1640-02 (S.C.)	21 yrs.		C							A			12/88		?	I	T	
<i>Wilson v. Wilson</i> (1983) 37 R.F.L. (2d) 205 (B.C.C.A.)	22 yrs.	A										50/50	50/50	285,000	65,100	I	T	

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Main-tenance	Valua-tion Date
			51 a 51 b 51 c 51 d 51 e 51 f Other (Factors considered not noted in digest)							Family Assets W/H	Busi. Assets W/H	Monetary Value			
												Family Assets	Busi. Assets		
<i>Hickley v. Hickley</i> [1982] B.C.D. Civ. 1645-03 (S.C.)	22 yrs.	A				C			50/50		480,000		I	T	
<i>Samuels v. Samuels</i> (1981) 30 B.C.L.R. 186, 22 R.F.L. (2d) 402 (S.C.)	22 yrs.	A							50/50	0/100	Mat. home	163,500	R	T	
<i>Keyser v. Keyser</i> (1982) 39 B.C.L.R. 325, 30 R.F.L. (2d) 38 (S.C.)	22 yrs.	A	C					C	50/50	0/100	150,000	490,000	I	T	
<i>Purish v. Purish</i> [1980] B.C.D. Civ. 1647-29 (S.C.)	22 yrs.	A						C	50/50	0/100	Mat. home	?	R	T	
<i>Slanz v. Slanz</i> (1984) 42 R.F.L. (2d) 390 (B.C.C.A.)	22 yrs.	A							50/50		155,000		nil	T	
<i>Eberts v. Eberts</i> [1984] B.C.D. Civ. 1674-14 (S.C.)	22 yrs.								75/25	0/100	33,000	46,000	LS CS	S	
<i>Podmoroff v. Podmoroff</i> (1984) B.C.D. Civ. 1645-30 (S.C.)	23 yrs.		A				A	A	77/23		64,843		LS CS	T	
<i>Lovio v. Lovio</i> [1985] B.C.D. Civ. 1670-01 (S.C.)	23 yrs.						A	C	100/0		40,000		nil	T	
<i>Halani v. Halani</i> , [1985] B.C.D. Civ. 1640-02 (S.C.)	24 yrs.	A						C		50/50		-700,000	nd	T	
<i>Arnason v. Arnason</i> (1981) 32 B.C.L.R. 292 (S.C.)	24 yrs.		C	C			C	A	45/55		131,000		nd	T	
<i>Davis v. Davis</i> [1984] B.C.D. Civ. 1654-03 (S.C.)	25 yrs.	A							50/50		30,000		nd	T	
<i>Anklewich v. Anklewich</i> [1983] B.C.D. Civ. 1654-02 (S.C.)	25 yrs		C				A	A	90/10		12,609		nd	T	

DIVISION OF FAMILY PROPERTY CHART—Continued

DIVISION OF FAMILY PROPERTY

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered							Distribution of Assets				Maintenance	Valuation Date		
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Monetary Value					
												Family Assets	Busi. Assets				
<i>Dzuba v. Dzuba</i> [1983] B.C.D. Civ. 1676-04 (S.C.)	25 yrs.		C				A			60/40		250,000		I	T		
<i>Williams v. Williams</i> (1982) 26 R.F.L. (2d) 325 (B.C.C.A.)	26 yrs.	A	C	A			C			50/50		34,000		nil	S		
<i>Wolverton v. Wolverton</i> (1980) 24 B.C.L.R. 33 (S.C.)	26 yrs.									43/57					T		
<i>Middleton v. Middleton</i> [1980] B.C.D. Civ. 1654-01 (S.C.)	26 yrs.		C	A					A	97/3		36,000		nd	T		
<i>Laxton v. Laxton</i> (1982) 41 B.C.L.R. 194, 31 R.F.L. (2d) 337 (C.A.)	26 yrs.	A				C				50/50	0/100	350-400,000	?	nd	T		
<i>Graystone v. Graystone</i> [1981] B.C.D. Civ. 1647-25 (S.C.)	27 yrs.	A					C	C		50/50		180,000		I	T		
<i>Edgar v. Edgar</i> (1984) 53 B.C.L.R. 100, 39 R.F.L. (2d) 436 (S.C.)	27 yrs.	A	C						C	50/50		160,000		I	T		
<i>Rutherford v. Rutherford</i> (1981) 30 B.C.L.R. 145, 23 R.F.L. (2d) 337 (C.A.)	27 yrs.	A								50/50	50/50	Pension		nil	S		
<i>Jarvis v. Jarvis</i> (1982) 32 R.F.L. (2d) 144 (B.C.S.C.)	27 yrs.	A								50/50		?		nil	T		
<i>Cunningham v. Cunningham</i> [1985] B.C.D. Civ. 1643-01 (S.C.)	27 yrs.		C				A	A		75/25	0/100	Mat. home	?	nd	T		
<i>Dolezar v. Dolezar</i> [1980] B.C.D. Civ. 1654-05 (S.C.)	27 yrs.		C	C			A	A		90/10		72,000			T		
<i>Blockberger v. Blockberger</i> (1981) 30 B.C.L.R. 78, 23 R.F.L. (2d) 177 (S.C.); var'd (1983) 48 B.C.L.R. 235, 36 R.F.L. (2d) 241 (C.A.)	28 yrs.		C				A	A		50/50	10/90	416,000	800,000	I	T		

DIVISION OF FAMILY PROPERTY CHART—Continued

DIVISION OF FAMILY

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Main-tenance	Valuation Date
											Monetary Value					
51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets W/H	Busi. Assets W/H	Family Assets	Busi. Assets						
<i>Silverwood v. Silverwood</i> (1981) 27 B.C.L.R. 392 (S.C.)	28 yrs.						A		55/45			110,000		18 mon.	DA	
<i>Margolese v. Margolese</i> (1981) 30 B.C.L.R. 381, 24 R.F.L. (2d) 176 (C.A.)	29 yrs.	A	C				C	C	50/50	50/50	4,665,555	?		nd	T	
<i>Christensen v. Christensen</i> (1980) 19 R.F.L. (2d) 240 (S.C.)	30 yrs.		C	A					50/50		?			nd	?	
<i>Tholl v. Tholl</i> (1985) 44 R.F.L. (2d) 337 (S.C.)	30 yrs.	A						A	80/20		50,000			nil	T	
<i>Horkoff v. Horkoff</i> [1984] B.C.D. Civ. 1670-05 (S.C.)	30 yrs.		C						50/50		2800,000			nd	T	
<i>Rushion v. Rushion</i> (1984) 38 R.F.L. (2d) 308 (B.C.S.C.)	30 yrs.	A							65/35		115,000			I	nd	
<i>Wood v. Wood</i> [1984] B.C.D. Civ. 1645-25 (S.C.)	30 + yrs.		C					A	50/50	15/85	250,000	200,000		I	T	
<i>Jackh v. Jackh</i> (1980) 22 B.C.L.R. 182, 18 R.F.L. (2d) 310 (S.C.)	31 yrs.		C						50/50		78,000 +			nil	T	
<i>Groves v. Groves</i> [1981] B.C.D. Civ. 1647-34 (S.C.)	32 yrs.	A						C	50/50		90,000			L.S.	T	
<i>Loyva v. Loyva</i> (1985) 61 B.C.L.R. 77 (B.C.C.A.)	32 yrs.	A							50/50					nd	T	
<i>Norton v. Norton</i> (1983) 34 R.F.L. (2d) 265 (S.C.)	33 yrs.		C					A	50/50 40/60		?			nd	T	
<i>Fong v. Fong</i> (1982) 28 R.F.L. (2d) 349 (B.C.S.C.)	34 yrs.	A						C	50/50		?			nd	T	
<i>Eng v. Eng</i> [1984] B.C.D. Civ. 1645-18 (S.C.)	35 yrs.	A	C		C				50/50	50/50	5,000,000	?		nd	T	

DIVISION OF FAMILY PROPERTY CHART—Continued

Case Name	Duration of Marriage	S. 43 Equal Interest	Section 51 Factors Considered								Distribution of Assets				Main-tenance	Valua-tion Date
			Factors Considered								Family Assets W/H	Busi. Assets W/H	Monetary Value			
			51 a	51 b	51 c	51 d	51 e	51 f	Other	Family Assets			Busi. Assets			
<i>Rafferty v. Rafferty</i> (1984) 39 R.F.L. (2d) 374 (B.C.S.C.)	35 yrs.	A											80,000		LS	T
<i>Sidhu v. Sidhu</i> [1981] B.C.D. Civ. 1645-14 (S.C.)	35 yrs.		C					A	A		80/20		237,000		nd	T
<i>Pavich v. Pavich</i> [1981] B.C.D. Civ. 1654-01 (S.C.)	37 yrs.		C				A		A	A	75/25		52,500		nd	T
<i>Coulthard v. Coulthard</i> (1984) 38 R.F.L. (2d) 78 (B.C.S.C.)	45 yrs.		C						A		20/80		696,000	Parents ?	nd	T

APPENDIX C

FAMILY PROPERTY LEGISLATION IN CANADIAN JURISDICTIONS

A. Introduction

This Appendix is a collection of family property legislation in Canadian common law jurisdictions other than British Columbia. The legislation is not reproduced here in its entirety. It has been substantially edited and reflects only the primary features of the various approaches adopted by the provinces and territories to determine divisible property and to vest jurisdiction in a court to depart from equal division. Some jurisdictions treat the matrimonial home differently from other assets. This is a policy decision of some significance, which should be noted. It does not, however, call for a comparison of Canadian legislation on this aspect of family property. Similarly, Canadian jurisdictions adopt different legislative approaches to spousal agreements, sometimes including extensive definitions of marriage agreements, separation agreements, cohabitation agreements and other kinds of contractual arrangements into which spouses may enter. The significant point in this respect is that only British Columbia has adopted a system that severely limits the spouses' ability to decide for themselves the proper division of their property. Accordingly, provincial legislation on these two topics has not been included in this Appendix.

The collection of Canadian legislation edited in this way provides a useful comparison of the various approaches to dividing family property on marriage breakdown in force in Canada. For a discussion comparing British Columbia legislation with that of other Canadian jurisdictions, please refer to Chapters II and XI of the Study Paper.

B. Extracts From Canadian Legislation

ALBERTA

MATRIMONIAL PROPERTY ACT

R.S.A. 1980, c. M-9, as amended.

Sec. 1. Definitions.

In this Act,

- (b) "household goods" means personal property
 - (i) that is owned by one or both spouses, and
 - (ii) that was ordinarily used or enjoyed by one or both spouses or one or more of the children residing in the matrimonial home, for transportation, household, educational, recreational, social or aesthetic purposes;
- (c) "matrimonial home" means property
 - (i) that is owned or leased by one or both spouses,
 - (ii) that is or has been occupied by the spouses as their family home, and
 - (iii) that is
 - (A) a house, or part of a house, that is a self-contained dwelling unit,
 - (B) part of business premises used as living accommodation,
 - (C) a mobile home,
 - (D) a residential unit as defined in the *Condominium Property Act*, or
 - (E) a suite;

Sec. 7. Distribution of property.

- (1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.
- (2) *Property exempted from distribution* — If the property is
 - (a) property acquired by a spouse by gift from a third party,
 - (b) property acquired by a spouse by inheritance,
 - (c) property acquired by a spouse before the marriage,
 - (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
 - (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses.the market value of that property
 - (f) at the time of marriage, or
 - (g) on the date on which the property was acquired by the spouse,whichever is later, is exempted from a distribution under this section.

(3) *Property subject to distribution* — The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

- (a) the difference between the exempted value of property described in subsection (2) (in this subsection referred to as the "original property") and the market value at the time of the trial of the original property or property acquired
 - (i) as a result of an exchange for the original property, or
 - (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
 - (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
 - (c) property acquired by a spouse after a decree *nisi* of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
 - (d) property acquired by a spouse by gift from the other spouse.
- (4) *Equal distribution* — If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

Sec. 8. Matters to be considered.

The matters to be taken into consideration in making a distribution under section 7 are the following:

- (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
- (c) the contribution, whether financial or in some other form made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
- (d) the income, earning capacity, liabilities, obligations, property and other financial resources
 - (i) that each spouse had at the time of marriage, and
 - (ii) that each spouse has at the time of the trial;
- (e) the duration of the marriage;
- (f) whether the property was acquired when the spouses were living separate and apart;
- (g) the terms of an oral or written agreement between the spouses;
- (h) that a spouse has made
 - (i) a substantial gift or property to a third party, or
 - (ii) a transfer of property to a third party other than a *bona fide* purchaser for value;
- (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
- (j) a prior order made by a court;
- (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
- (l) that a spouse has dissipated property to the detriment of the other spouse;
- (m) any fact or circumstance that is relevant.

MANITOBA

THE MATRIMONIAL PROPERTY ACT

S.M. 1978, c. 24/M45, as amended.

Whereas marriage is an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights;

And Whereas it is advisable to provide for a presumption, in the event of the breakdown of the marriage, of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage;

Sec. 1. Definitions. —(1) In this Act,

- (a) "asset" means any real or personal property or legal or equitable interest therein including, without restricting the generality of the foregoing, a chose in action,

money, jewelry and a marital home, but not including any article of personal apparel;

- (b) "commercial asset" means an asset that is not a family asset;
- (c) "dissipation" means the jeopardizing of the financial security of a household by the gross and irresponsible squandering of an asset;
- (d) "family asset" means an asset owned by 2 spouses or either of them and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes, including, without restricting the generality of the foregoing,
 - (i) a marital home,
 - (ii) money in a savings account, chequing account or current account with a bank, trust company, credit union or other financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and saving bonds and deposit receipts intended to be used for those purposes,
 - (iii) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the asset,
 - (iv) an asset over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse, if the asset would be a family asset if it were owned by the spouse, and
 - (v) an asset disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to use or dispose of the asset, if the asset would be a family asset if it were owned by the spouse;
- (e) "marital home" means property in which a spouse has an interest and that is or has been occupied by the spouses as their family residence and, where the property that includes the family residence is normally used for a purpose other than residential only, includes only the portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence, and where the property is owned by a corporation in which a spouse owns shares that entitle the spouse to occupy the property that spouse has an interest in the property;

(2) *Life Insurance, Pension Plans, etc.* — Notwithstanding clause (1)(d) but subject to subsection (3), the following assets are family assets within the meaning and for the purposes of this Act, whether or not the proceeds thereof or the benefits or payments thereunder, as the case may be, are used or intended to be used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes:

- (a) Rights under a life insurance policy.
- (b) Rights under an accident and sickness insurance policy.
- (c) Rights under a life or fixed term annuity policy.
- (d) Rights under a pension or superannuation scheme or plan.

(3) *Insurance for Business Purpose.* A life insurance policy or an accident and sickness insurance policy is not a family asset within the meaning and for the purposes of this Act where the purpose of the policy is to provide funds that the beneficiary of the policy will likely require, or compensation for loss that the beneficiary of the policy will likely suffer, in respect of a business undertaking, in the event and as a result of the death, injury, illness, disability or incapacity of the person insured.

Sec. 3. Assets generally.

Where this Act applies to a spouse under section 2 it also applies to every asset of the spouse except as herein otherwise provided, and where this Act does not apply to a spouse by reason of any provision of section 2 it also does not apply to any asset of the spouse notwithstanding any other provision of the Act.

Sec. 4. Assets acquired during marriage and cohabitation.

- (1) This Act does not apply to any asset acquired by a spouse
 - (a) while married to but living separate and apart from the other spouse; or
 - (b) while married to a former spouse unless the asset was acquired while living separate and apart from the former spouse and it can be shown that the asset was acquired in contemplation of marriage to the present spouse; or
 - (c) while unmarried.

(2) *Assets Acquired Before Marriage.* (2) Notwithstanding clause (1)(c), this Act applies to any asset acquired by a spouse prior to but in specific contemplation of the marriage to the other spouse.

(3) *Appreciation, depreciation, income.* Where by reason of any provision of subsection (1) this Act does not apply to an asset of a spouse, then, with respect to all assets other than those exempted from the application of this Act by section 7, in any accounting under Part II, notwithstanding that provision,

- (a) any appreciation in the value of the asset that occurred while the spouse was married to and cohabiting with the other spouse shall be added to the inventory of assets of that spouse;
- (b) any depreciation in the value of the asset that occurred while the spouse was married to and cohabiting with the other spouse shall be deducted from the inventory of assets of that spouse; and
- (c) any income from the asset earned while the spouse was married to and cohabiting with the other spouse shall be treated in the same way as income from an asset to which this Act applies.

(4) *Negative value.* Where under subsection (3) the combined depreciation in all assets of a spouse exceeds the combined value of any appreciation in and income from those assets, the excessive portion of the depreciation shall not be deducted except pursuant to the order of a court made upon an application under Part III.

Sec. 5. Assets disposed of by spousal agreement.

(1) This Act does not apply to any asset disposed of by a spousal agreement or as to which the Act is made inapplicable by the terms of a spousal agreement, but where a spousal agreement is silent as to an asset this Act if otherwise applicable to the asset applies as if the spousal agreement did not exist.

(2) *Provision of Act Made Inapplicable by Agreement.* Where a spousal agreement by its terms makes a provision of this Act inapplicable to an asset, that provision does not apply to the asset but the remaining provisions of the Act if otherwise applicable to the asset apply as if the spousal agreement did not exist.

(3) *Provision of Act varied by Agreement.* Where a spousal agreement by its terms varies any provision of this Act in its application to an asset, that provision if otherwise applicable to the asset applies as varied and the remaining provisions of the Act if otherwise applicable to the asset apply in unaltered form.

Sec. 6. Disposal of assets.

(1) No provision of this Act, nor the giving of an accounting under Part II, vests any title to or interest in any asset of one spouse in the other spouse, and the spouse who owns the asset may, subject to subsections (7), (8), (9), and (10) and to any order of a court made under Part III, sell lease, mortgage, hypothecate, repair, improve demolish, spend or otherwise deal with or dispose of the asset to all intents and purposes as if this Act has not been passed. (2) *Use of Marital Home.* Notwithstanding subsection (1), spouses each have an equal right to the use and enjoyment of their marital home, but the right is subject to any order of a court

- (a) made under *The Family Maintenance Act*; or
- (b) made in or as incidental or ancillary to proceeding in a matrimonial cause as defined in *The Queen's Bench Act*;

whereby one spouse is given possession of the marital home to the exclusion of the other.

(3) *Use of Other Family Assets.* Notwithstanding subsection (1), spouses each have an equal right to the use and enjoyment of any family asset, other than their marital home, that is ordinarily used or enjoyed by both of them.

(4) *Asset Transferred, etc.* Subject to subsections (7), (8), (9) and (10) and to any order of a court made under Part III, this Act does not apply to an asset that a spouse no longer owns as at the closing date established for any accounting under Part II in which the asset would otherwise have been included under the Act.

(5) *Proceeds of Sale.* Where this Act does not apply to an asset, it does not apply as well to the proceeds of sale of the asset or to any other asset acquired in exchange for or purchased with the proceeds of sale of the asset, except where

- (a) the proceeds are used to acquire a family asset; or
- (b) the asset acquired in exchange is a family asset.

(6) *Proceeds of Sale.* Where this Act applies to an asset, it applies as well to the proceeds of sale of the asset and to any other asset acquired in exchange for or purchased with the proceeds of sale of the asset.

(7) Dissipation of Asset. Where

- (a) a spouse, before or after the coming into force of this Act but after May 6, 1977, dissipates an asset in whole or in part; and
- (b) the other spouse, before the expiry of 2 years from the date of the dissipation referred to in clause (a) or from the date of the discovery thereof, applies to a court under Part III for an accounting and division of assets;

the value of the dissipated asset or the dissipated portion thereof, as the case may be, shall be added to the inventory of assets of the spouse in the accounting.

Sec. 7. Gift, trust benefit.

(1) This Act does not apply to any asset acquired by a spouse by way of gift or trust benefit from a 3rd person, unless it can be shown that the gift or benefit was conferred with the intention of benefitting both spouses.

(2) *Gift of Insurance Premiums.* This Act does not apply to the proceeds of the surrender or the cash surrender value of any insurance policy where the premiums of the policy were paid by a 3rd person by way of gift in favour of a spouse, unless it can be shown that the premiums were paid with the intention of benefitting both spouses.

(3) *Inheritance.* This Act does not apply to any asset acquired by a spouse by way of inheritance, unless it can be shown that the inheritance was devised or bequeathed with the intention of benefitting both spouses.

(4) *Income, Appreciation, Depreciation.* Any income from, or appreciation or depreciation in the value of, an asset acquired in the manner described in subsection (1), (2) or (3) shall not be included in any accounting under Part II, unless it can be shown that the gift was conferred or the inheritance devised or bequeathed, as the case may be, with the intention that the income or appreciation should benefit both spouses.

(5) *Exception.* Notwithstanding subsection (4), any income from or appreciation in the value of an asset acquired in the manner described in subsection (1), (2) or (3), shall be included in any accounting under Part II, if the income or appreciation is used for the purchase of a family asset.

Sec. 8. Damage award for personal injury.

(1) This Act does not apply to the proceeds of any damage award or settlement or insurance claim made in favour of a spouse for personal injury, or disability, except to the extent that the proceeds are compensation for loss to both spouses.

(2) *Insurance Claim for Damage to Asset.* The proceeds of any insurance claim for loss or damage to an asset shall be deemed to be proceeds from the sale of that asset.

Sec. 8.1. Assets in form of rights.

(1) Where this Act applies to an asset, it applies

(a) notwithstanding that the asset consists of mere rights, whether present, future or contingent; and

(b) notwithstanding that, as at the closing and valuation date of an accounting under section 14 in which the rights are sought to be included as an asset, they have not been realized and it is not ascertainable whether they will ever be realized or to what extent they will be realized;

but the Act does not apply where it is in fact ascertained, as at the closing and valuation date, that there is no reasonable possibility of the rights ever being realized.

(2) *Insurance policies, pension plans, etc.* In subsection (1), the expression "rights" includes, without restricting the generality of that expression, rights under

(a) a life insurance policy; or

(b) an accident and sickness insurance policy; or

(c) a life or fixed term annuity policy; or

(d) a pension or superannuation scheme or plan.

Sec. 9. Asset already shared.

This Act does not apply to any asset that has already been shared equally between spouses, or that is acquired by one spouse from the other by virtue of a sharing of assets under this Act.

Sec. 10. Liabilities.

(1) In any accounting under Part II, the liabilities of a spouse other than those relating to assets that are exempt from the accounting by sections 4 and 7 shall be deducted from the total inventory of the assets of that spouse.

(2) *Negative value.* Subsection (1) does not permit a deduction of debts and liabilities resulting in a negative value, except where a court upon an application under Part III so orders.

Sec. 11. Foreign asset.

The value of an asset situated outside of Manitoba shall be taken into consideration in an accounting and division under Part II.

Sec. 12. Right to accounting and equalization.

Subject to section 13, spouses each have the right upon application to have an accounting of assets under section 14 and an equalization of assets under section 16.

Sec. 13. Discretion to vary equal division of family assets.

(1) A court upon the application of either spouse under Part III may order that, with respect to the family assets of the spouses, the amount shown by an accounting under section 14 to be payable by one spouse to the other be altered if the court is satisfied that equalization would be grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or the extraordinary nature of value of any of their assets.

(2) *Discretion to vary equal division of commercial assets.* A court upon the application of either spouse under Part III may order that, with respect to the commercial assets of the spouses, the amount shown by an accounting under section 14 to be payable by one spouse to the other be altered if the court is satisfied that equalization would be clearly inequitable having regard to the circumstances the court deems relevant including

- (a) the unreasonable impoverishment by either spouse of the family assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) any spousal agreement between the spouses;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the length of time that the spouses have lived separate and apart from each other during their marriage;
- (f) whether either spouse has assets of an extraordinary value to which this Act does not apply by reason of their having been acquired by way of gift or inheritance;
- (g) the nature of the assets; and
- (h) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage.

(3) *Conduct not a factor.* In exercising its discretion under this section, no court shall have regard to conduct on the part of a spouse unless that conduct amounts to dissipation.

Sec. 14. Accounting and division.

(1) In an accounting of assets between spouses under this Part, there shall be ascertained

- (a) the value of the total inventory of assets of each spouse, after adding to or deducting from the inventory such amounts as are required under this Act to be added or deducted;
- (b) the value of the share to which each spouse is entitled upon the division, to be determined by combining the values ascertained under clause (a) and dividing the total into 2 equal shares or such other shares as a court may under section 13 order; and
- (c) the amount payable by one spouse to the other in order to satisfy the share of each spouse as determined under clause (b).

(2) *Fair market value.* The value of any asset for the purposes of subsection (1) shall be the amount that the asset might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

(3) *Valuation of non-marketable assets.* Where an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1) shall be determined on such other basis or by such other means as is appropriate for assets of that nature.

Sec. 15. Closing and valuation dates.

In any accounting under section 14, the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability shall be as the spouses may agree and, in the absence of agreement,

- (a) the date when the spouses last cohabited with each other; or
- (b) where the spouses continue to cohabit with each other, the date either of them makes an application to a court under Part III for an accounting of assets.

Sec. 16. Method of payment.

The amount shown by an accounting under section 14 to be payable by one spouse to the other may be satisfied

- (a) by payment of the amount in a lump sum or by instalments; or
- (b) by the transfer, conveyance or delivery of an asset or assets in lieu of the amount; or
- (c) by any combination of clauses (a) and (b);

as the spouses may agree or, in the absence of agreement, as a court upon the application of either spouse under Part III may order.

**NEW BRUNSWICK
MATRIMONIAL PROPERTY ACT**

S.N.B. 1980, c. M-1.1.

Sec. 1. Definitions.

In this Act

"business asset" means property owned by one spouse and used principally in the course of a business carried on by that spouse, either alone or jointly with others, and includes shares that the spouse owns in a corporation through which he or she carries on a business;

"family assets" means property, whether acquired before or after marriage, owned by one spouse or both spouses and ordinarily used or enjoyed for shelter or transportation or for household, educational, recreation, social or aesthetic purposes by both spouses or one or more of their children while the spouses were cohabiting, and includes

- (a) a marital home and household goods;
- (b) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;
- (c) shares in a corporation or an interest in a partnership or trust owned by a spouse having a market value equal to the value of the benefit the spouse has in respect of property owned by the corporation, partnership or trustee that would, if it were owned by the spouse, be a family asset;
- (d) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse; and
- (e) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, if the property would be a family asset if it were owned by the spouse;

but does not include property that the spouses have agreed by a domestic contract is not to be included in family assets;

"household goods" means furniture, equipment, appliances and effects owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or by one or more of their children within or about a marital home while the spouses are or were cohabiting;

"marital debts" means the indebtedness of either or both spouses to another person

- (a) for the purpose of facilitating, during cohabitation, the support, education or recreation of the spouses or one or more of their children; or
- (b) in relation to the acquisition, management, maintenance, operation or improvement of marital property;

"marital home" means a marital home referred to in section 16;

"marital property" means

- (a) family assets;
- (b) property owned by one spouse or by both spouses that is not a family asset and that was acquired while the spouses cohabited or in contemplation of marriage, except
 - (i) a business asset,
 - (ii) property that was a gift from one spouse to the other, including income from that property,
 - (iii) property that was a gift, devise or bequest from any other person to one spouse only, including income from that property,
 - (iv) property that represents the proceeds of disposition of property that was not a family asset and was not acquired while the spouses cohabited or in contemplation of marriage, or that was acquired in exchange for or was purchased with the proceeds of disposition of such property or that represents insurance proceeds with respect to loss of or damage to such property; and
 - (v) property that represents the proceeds of disposition of property referred to in subparagraphs (ii) and (iii) or that was acquired in exchange for or was purchased with the proceeds of disposition of such property or that represents insurance proceeds with respect to loss of or damage to such property; and
- (c) property that was acquired by one spouse after the cessation of cohabitation and that was acquired through the disposition of property that would have been marital property had the disposition not occurred; but does not include property that the spouses have agreed by a domestic contract is not to be included in marital property;

"net proceeds" means the proceeds realized by a spouse pursuant to the disposition of an interest in a marital home after deducting any sums

- (a) payable in respect of any rents owing, any unpaid taxes or any mortgage or lien against the property, or
- (b) payable in respect of any obligation reasonably incurred in connection with the disposition that gives rise to the proceeds;

"property" means real or personal property and includes any interest therein;

"spouse" means a married person.

Sec. 2. Joint responsibilities of spouses.

Child care, household management and financial provision are joint responsibilities of spouses and are recognized to be of equal importance in assessing the contributions of the respective spouses to the acquisition, management, maintenance, operation or improvement of marital property; and subject to the equitable considerations recognized elsewhere in this Act the contribution of each spouse to the fulfillment of these responsibilities entitles each spouse to an equal share of the marital property and imposes on each spouse, in relation to the other, the burden of an equal share of the marital debts.

Sec. 3. Division of marital property.

(1) Where

- (a) a decree *nisi* of divorce is pronounced,
- (b) a marriage is declared a nullity,
- (c) the spouses are living separate and apart and there is no reasonable prospect of the resumption of cohabitation, or
- (d) a marriage has broken down and there is no reasonable prospect of reconciliation, whether or not the spouses are living separate and apart,

each spouse, upon application to the Court, is entitled to have the marital property divided in equal shares.

Sec. 6. Family asset acquired before marriage or as gift.

Where marital property to be divided under section 3 or 4 includes a family asset that was acquired

- (a) before the spouses married, or
- (b) by one spouse as a gift from the other spouse or as a gift, devise or bequest from any other person,

the Court may exclude that family asset from the division of marital property if in the discretion of the Court, it would be unfair and unreasonable to the owner to include the family asset in the division of marital property, taking into account the circumstances of the case as well as one or more of the following considerations, namely, that

- (c) there was a substantial contribution by the non-owning spouse to the acquisition, management, maintenance, operation or improvement of the family asset;
- (d) the cohabitation of the spouses was of short duration;
- (e) the spouses had an agreement, arrangement or understanding that the use of the family asset by the non-owning spouse or any of their children would not prejudice any rights of the owning spouse to the family asset, notwithstanding that this was not expressed in a domestic contract.

Sec. 7. Unequal division of marital property.

Notwithstanding sections 2, 3 and 4, the Court may make a division of marital property resulting in shares that are not equal if the Court is of the opinion that a division of the marital property in equal shares would be inequitable, having regard to

- (a) any agreement other than a domestic contract,
- (b) the duration of the period of cohabitation under the marriage,
- (c) the duration of the period during which the spouses have lived separate and apart,
- (d) the date when the property was acquired,
- (e) the extent to which property was acquired by one spouse by inheritance or by gift, or
- (f) any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of marital property to be in equal shares.

Sec. 8. Division of property other than marital property. —

In determining any application for a division of marital property the Court may make a division of any property of either spouse that is not marital property where

- (a) a spouse has, through transfer, indebtedness, mismanagement or other means, unreasonably impoverished the marital property; or
- (b) the result of the division of marital property would be inequitable in the circumstances having regard to
 - (i) the considerations set out in paragraphs 7(a) to (f), and
 - (ii) the effect of the assumption by one spouse of any of the responsibilities set out in section 2 on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not marital property,

Sec. 9. Division of marital debts.

In an application under section 3 or 4 the Court, in dividing property, shall effect a fair and equitable division of marital debts and shall take into account any tax consequences that may arise from the division of property by Court order.

Sec. 20. Equal sharing of proceeds of disposition.

(1) Subject to an order made under subsection (2), and to the provisions of a domestic contract, each spouse is entitled to one-half of the net proceeds realized by one or by both of the spouses from the disposition of an interest in the marital home.

(2) *Unequal division.* On the application of a spouse, the Court may order a division of the net proceeds realized from the disposition of an interest in the marital home resulting in shares that are not equal if the Court is of the opinion that to divide the net proceeds in equal shares would be inequitable, having regard to

- (a) any agreement other than a domestic contract,
- (b) the duration of the period of cohabitation under the marriage,
- (c) the duration of the period during which the spouses have lived separate and apart,
- (d) the date when the interest in the marital home was acquired,
- (e) the extent to which the interest in the marital home was acquired by one spouse by inheritance or by gift, or
- (f) any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of the marital home rendering it inequitable for the division of net proceeds to be in equal shares.

Sec. 42. Determination of questions between spouses and former spouses.

Any interested person may apply to the Court for the determination of any question between a spouse or former spouse and his or her spouse or former spouse as to the ownership or right to possession of any property, and the Court may

- (a) declare the ownership or right to possession;
- (b) order payment in compensation for the interest of either party;
- (c) order that the property be partitioned or sold for the purpose of realizing the interest therein; and
- (d) order that either or both spouses give security for the performance of any obligation imposed by the order, including a charge on property;

and may make such other orders or directions as are ancillary thereto.

(2) *Contribution of work, money or money's worth.* In determining any question referred to in subsection (1) the Court shall regard any contribution in terms of work, money or money's worth with respect to the acquisition, management, maintenance, operation or improvement of property as a contribution giving rise to an interest in the property, and the Court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

(3) *Presumption.* Where both spouses or former spouses have contributed substantially to the acquisition, management, maintenance, operation or improvement of property the contributions of the spouses or former spouses shall be presumed to have been equal, and the onus lies on the spouse or former spouse claiming the larger share to establish that he or she made the greater contribution.

Sec. 47. Rights given by Act not constituting interest in property

Any right given to a spouse under section 2, 3 or 4 to a division of property, or under section 18, 23 or 26 to the possession of property, does not constitute an interest in property owned by the other spouse and, except where otherwise provided in this Act or an order made under this Act, shall not be construed so as to prevent the spouse who owns marital property from disposing of that property as if this Act had not been passed.

NEWFOUNDLAND
THE MATRIMONIAL PROPERTY ACT
S.Nfld. 1979, c. 32, as amended.

Sec. 3. Purpose of Act.

The purpose of this Act is to reform the law with respect to matrimonial property in order to

- (a) recognize the contribution made by each spouse to a marriage;
- (b) give a one-half interest in the matrimonial home to each spouse;
- (c) provide for the deferred sharing of most other property acquired during a marriage; and
- (d) provide for judicial discretion in sharing business assets built up by a spouse during a marriage.

Sec. 4. Interpretation.

(1) In this Act the term "matrimonial home" means the dwelling and real property occupied by a person and his or her spouse as their family residence and owned by either or both of them whether that occupation occurred before, on or after the commencement of this Act.

(2) Property used for residential and other purposes — Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

(3) Condominium — The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling unit owned by the corporation shall be deemed to be an interest in the dwelling unit for the purposes of subsection (1).

(4) Dwelling having up to three apartments — Where a dwelling has up to three apartments, those apartments are deemed to form part of the matrimonial home for the purposes of this Act.

(5) Mobile home, trailer — A dwelling includes a house, condominium, mobile home or trailer.

(6) More than one matrimonial home — A person and his or her spouse may have more than one matrimonial home.

Sec. 5. Application of Part.

This Act applies to any matrimonial home located in the province notwithstanding that

- (a) the matrimonial home was acquired by gift, settlement, inheritance or otherwise by one or both of the spouses prior to the marriage;
- (b) the spouses entered into the marriage before this Act comes into force;
- (c) the matrimonial home was acquired before this Act comes into force; or
- (d) a proceeding to determine the rights as between spouses in respect of property has been commenced and not decided before the Act comes into force.

Sec. 6. Matrimonial home.

(1) Notwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a one-half interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has.

(2) Joint tenancy. Subsection (1) creates a joint tenancy with respect to the matrimonial home.

(3) Tenancy in common. Notwithstanding subsection (2), where spouses hold a matrimonial home as tenants in common, either before or after the coming into force of this Act, that tenancy continues.

Sec. 16. Definition.

(1) In this Part

- (a) "business assets" means property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose; and
- (b) "matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,
 - (i) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse and any appreciation in value of them during the marriage,
 - (ii) personal injury awards, except the portion of the award, if any, that represents compensation for economic loss,

- (iii) personal effects,
- (iv) business assets,
- (v) property exempted under a marriage contract or separation agreement,
- (vi) family heirlooms, and
- (vii) real and personal property acquired after separation.

(2) Matrimonial home. In the case of a matrimonial home, matrimonial assets includes a matrimonial home acquired before the marriage, and notwithstanding subparagraph (i) of paragraph (b) of subsection (1), includes a matrimonial home acquired by gift, settlement or inheritance.

(3) Property owned by corporation. Where before or after the coming into force of this Act property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the matrimonial assets acquired during the course of the marriage.

Sec. 17. Purpose of Part.

The purpose of this Part is to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by each of the spouses, financial and otherwise, that entitles each spouse to an equal division of the matrimonial assets acquired during the course of the marriage.

Sec. 18. Application of Part.

This Part applies notwithstanding that

- (a) the spouses entered into the marriage before this Act comes into force;
- (b) the matrimonial asset was acquired before this Act comes into force; or
- (c) a proceeding to determine the rights as between spouses in respect of property has been commenced and not finally decided before this Act comes into force.

Sec. 19. Division of assets.

(1) Where

- (a) a petition for divorce is filed,
 - (b) a marriage is declared a nullity,
 - (c) the spouses have been separated and there is no reasonable prospect of the resumption of cohabitation, or
 - (d) one of the spouses has died,
- either spouse is entitled to apply to a court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

(2) Rights of surviving spouse additional. Any rights that a surviving spouse has to the ownership or division of property under this Act is in addition to any rights that the surviving spouse has as a result of the death of his or her spouse, whether these rights arise on intestacy or by will.

Sec. 20. Variation of division.

The court may make a division of matrimonial assets that is not equal where the court is satisfied that a division of these assets in equal shares would be grossly unjust or unconscionable taking into account any of the following factors:

- (a) the income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the spouses before the breakdown of the marriage;
- (d) the age of each party;
- (e) the duration of the marriage;
- (f) any physical or mental disability of either of the spouses;
- (g) the contributions made by each of the spouses to the welfare of the family, including any contribution made by a spouse in looking after the matrimonial home or caring for the family;
- (h) the loss of a potential benefit that a spouse loses by reason of a dissolution or annulment of the marriage;
- (i) the unreasonable impoverishment or dissipation of matrimonial assets by either of the spouses;
- (j) the length of time that the spouses have lived separate and apart from each other during the marriage; or
- (k) the date of acquisition of each matrimonial asset.

Sec. 21. Allegation of misconduct.

The court shall not take into account any allegation of misconduct on the part of either or both of the spouses in dealing with an application under this Act.

Sec. 27. Business assets.

Where one spouse, has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

- (a) direct the other spouse to pay such an amount as the court orders to compensate the contributing spouse therefore; or
- (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting contribution are those of a reasonable spouse of that sex in the circumstances.

Sec. 29. Property held in both names.

Property, including money on deposit, held in the name of both spouses is *prima facie* proof that each spouse is intended to have a one-half beneficial interest in the property on severance thereof.

NOVA SCOTIA

THE MATRIMONIAL PROPERTY ACT

S.N.S. 1980, c. 9.

Preamble. Whereas it is desirable to encourage and strengthen the role of the family in society; and whereas for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;

and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;

and whereas it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;

and whereas it is desirable to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets;

Sec. 2. Definitions. —

In this Act,

- (a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;
- (d) "dwelling" includes a house, condominium, cottage, mobile home, trailer or boat occupied as a residence;
- (e) "marriage contract" means a marriage contract pursuant to Section 23 of this Act;
- (f) "separation agreement" means an agreement in writing between spouses who are living or intend to live separate and apart.

Sec. 3. Matrimonial home.

(1) In this Act the term "matrimonial home" means the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest.

(2) Property used for other than residential purposes. Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

(3) Share of a corporation. The ownership of a share or an interest in a share or a corporation entitling the owner to the corporation shall be deemed to be an interest in the dwelling for the purpose of this Section.

(4) More than one matrimonial home. A person and the person's spouse may have more than one matrimonial home.

Sec. 4. Matrimonial assets.

(1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;
- (f) property exempted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.

(2) Award of damages, etc. Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset.

(3) Resumption of cohabitation. For the purposes of clause (g) of subsection (1) spouses shall be deemed not to have resumed cohabitation where there has been a resumption of cohabitation by the spouses during a period or periods in aggregate not exceeding more than ninety days with reconciliation as its primary purpose.

(4) Property owned by corporation. Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of that property are matrimonial assets.

Sec. 12. Division of matrimonial assets.

(1) Where

- (a) a petition for divorce is filed;
- (b) an application is filed for a declaration of nullity;
- (c) the spouses have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or
- (d) one of the spouses has died,
either spouse is entitled to apply to the court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

Sec. 13. Unequal division of matrimonial assets.

Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal, or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors;

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) a marriage contract or separation agreement between the spouses;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other spouse;
- (h) the needs of a child who has not attained the age of majority;
- (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets.

ONTARIO

FAMILY LAW REFORM ACT

R.S.O. 1980, c. 152, as amended.

Preamble. Whereas it is desirable to encourage and strengthen the role of the family in society; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership; and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.

Sec. 3. Interpretation.

In this Part,

- (b) "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes,
 - (i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;
 - (ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property;
 - (iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse; and
 - (iv) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse, but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets;
- (c) "property" means real or personal property of any interest therein.

Sec. 4. Division of family assets.

(1) Subject to subsection (4), where a decree *nisi* of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, each spouse is entitled to have the family assets divided in equal shares notwithstanding the ownership of the assets by the spouses as determined for other purposes and notwithstanding any order under section 7.

(2) Application to court. The court, may, upon the application of a person who is the spouse of another, determine any matter respecting the division of family assets between them.

(3) Effect of death of spouse. The rights under subsection (1) are personal as between the spouses but any application commenced under subsection (2) before the death of a spouse may be continued by or against the estate of the deceased spouse.

(4) Variation of division. The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to,

- (a) any agreement other than a domestic contract;
- (b) the duration of the period of cohabitation under the marriage;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when the property was acquired;
- (e) the extent to which property was acquired by one spouse by inheritance or by gift; or
- (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

(5) Purpose. The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to an equal division of the family assets, subject to the equitable considerations set out in subsections (4) and (6).

(6) Property other than family assets. The court shall make a division of any property that is not a family asset where,

- (a) a spouse has unreasonably impoverished the family asset; or
- (b) the result of a division of the family assets would be inequitable in all the circumstances, having regard to,
 - (i) the considerations set out in clauses 4(a) to (f), and
 - (ii) the effect of the assumption by one spouse of any of the responsibilities set out in subsection (5) on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset.

Sec. 8. Contribution of property.

Where one spouse or former spouse has contributed work, money or money's worth in respect to the acquisition, management, maintenance, operation or improvement of property, other than family assets, in which the other has or had an interest, upon application, the court may by order,

- (a) direct the payment of an amount in compensation therefore; or
- (b) award a share of the interest of the other spouse or former spouse in the property appropriate to the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

PRINCE EDWARD ISLAND

FAMILY LAW REFORM ACT

R.S.P.E.I. 1974, c. F-2.1, as am. aded.

Sec. 4. Interpretation.

In this Part,

- (a) family assets. "family assets" means a matrimonial home as determined under Part III and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes
 - (i) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social and aesthetic purposes,
 - (ii) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,
 - (iii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself, if the property would be a family asset if it were owned by the spouse, and
 - (iv) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets;

- (b) property. "property" means real or personal property or any interest therein.

Sec. 5. Division of family assets.

(1) Subject to subsection (3), where a decree *nisi* of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of the resumption of cohabitation, each spouse is entitled to have the family assets divided in equal

shares by value notwithstanding the ownership of the assets by the spouses as determinable for other purposes and notwithstanding any order under section 7.

(2) Application to court. The court may, upon the application of a person who is the spouse of another, determine any matter respecting the division of family assets between them.

(3) Effect of death of spouse. The rights under subsection (1) are personal as between the spouses but any application commenced under subsection (2) before the death of a spouse may be continued by or against the estate of the deceased spouse.

(4) Ante-nuptial property. For the purpose of determining the value of any property which

(a) is a family asset; and

(b) was acquired by either spouse prior to the date of the marriage, the court shall deduct from the net value of that property at the date of the hearing such sum as the court determines to be the value, at the date of the marriage, of the equity in that property owned by that spouse.

(5) Variation of division. The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to

(a) any agreement other than a domestic contract;

(b) the duration of the period of cohabitation under the marriage;

(c) the duration of the period during which the spouses have lived separate and apart;

(d) the date when the property was acquired;

(e) the extent to which property was acquired by one spouse by inheritance or by gift; or

(f) any other circumstances relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

(6) Property other than family assets. Where in the opinion of the court, a spouse has unreasonably impoverished the family assets or the result of a division of the family assets would be inequitable in all the circumstances having regard to the considerations set out in clauses 5(a) to (f), the court may make a division of any property that is not a family asset.

(7) Purpose. The purpose of this section is to recognize that inherent in the marital relationship there is mutual contribution by the spouses, whether financial or otherwise, to the family welfare, entitling each spouse to an equal division of the family assets upon termination of the marriage, subject to the equitable considerations set out in subsections (5) and (6).

Sec. 9. Contribution to property.

(1) Where one spouse or former spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property, other than family assets, in which the other has or had an interest, upon application, the court may by order

(a) direct the payment of an amount in compensation therefore; or

(b) award a share of the interest of the other spouse or former spouse in the property appropriate to the contribution.

(2) Assessment of contribution. For the purposes of subsection (1) the court shall determine and assess the contribution on the basis that a resulting trust is created by the contribution, unless the contrary is shown, and without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

SASKATCHEWAN

THE MATRIMONIAL PROPERTY ACT

S.S. 1979, c. M-61, as amended.

Sec. 2. Interpretation.

In this Act:

(d) "dissipate". "dissipate" means to jeopardize the financial security of a household by the squandering of property;

(e) "household goods". "household goods" means personal property that is ordinarily used, acquired or enjoyed by one or both spouses for transportation, household, educational, recreational, social or aesthetic purposes, but does not include heirlooms, antiques, works of art, clothing, jewelry or other articles of personal use, necessity or ornament or any personal property acquired or used in connection with a trade, business, calling, profession, occupation, hobby or investment;

- (f) "interspousal contract". "interspousal contract" means a binding contract made in accordance with section 38;
 - (g) "matrimonial home". "matrimonial home" means property:
 - (i) that is:
 - (A) owned by or leased to one or both spouses, or in which one or both spouses have an interest including, without limiting the generality of the foregoing, an interest under a partnership or trust or an interest as a purchaser under an agreement for sale; or
 - (B) owned by a corporation in which one or both spouses have an interest where, by virtue of that interest, one or both spouses are entitled to occupy the property as a family home; and
 - (ii) that is or has been occupied by one or both spouses as the family home or that is mutually intended by the spouses to be occupied by one or both of them as the family home;
- and that is:
- (iii) a house or part of a house, including the land appurtenant thereto consisting of not more than sixty-five hectares;
 - (iv) part of business premises used as living accommodation;
 - (v) a trailer or vehicle commonly referred to as a mobile home, including the land appurtenant thereto consisting of not more than sixty-five hectares;
 - (vi) a unit or additional unit in a condominium plan or a replacement plan, as the case may be, as referred to in *The Condominium Property Act*, including the owner's share in the common property as shown on that plan; or
 - (vii) a suite;
- but, for the purpose of Part II, III and IV, a matrimonial home shall also meet the requirements of matrimonial property as defined in clause (h);
- (h) "matrimonial property". "matrimonial property" means any real or personal property whatsoever, regardless of its source, kind or nature, that, at the time an application is made under this Act, is owned, or in which an interest is held, by one or both spouses, or by one or both spouses and a third person, and, without limiting the generality of the foregoing includes:
 - (i) a security or other interest in a corporation or an interest in a trust, partnership, association, organization, society or other joint venture;
 - (ii) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in his favour;
 - (iii) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to consume, invoke or dispose of the property;
 - (iv) property mentioned in section 28;
 - (i) "matrimonial property order". "matrimonial property order" means an order of a court made under this Act;
 - (l) "value". "value" means the fair market value at the time an application is made under this Act, or at the time of adjudication, whichever the court thinks fit, or, where a fair market value cannot be determined, any value at the time an application is made under this Act, or at the time of adjudication that the court considers reasonable.

Sec. 3. Application of Act.

This Act applies notwithstanding that:

- (a) the spouses entered into marriage before the coming into force of this Act;
- (b) the matrimonial property in issue was acquired before the coming into force of this Act; or
- (c) a proceeding to determine the rights as between spouses in respect of matrimonial property has been commenced before the coming into force of this Act.

Sec. 20. Purpose.

The purpose of this Act, and in particular of this Part, is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the matrimonial property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.

Sec. 21. Distribution of matrimonial property.

(1) Upon application by a spouse for the distribution of matrimonial property, the court shall, subject to any exceptions, exemptions and equitable considerations mentioned in this Act, order that the matrimonial property or its value be distributed equally between the spouses.

(2) Power of court to order unequal distribution. Subject to section 22, where, having regard to:

- (a) any written agreement between the spouses or between one or both spouses and a third party;
- (b) the length of the period during which the spouses have cohabited before or during their marriage;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when the matrimonial property was acquired;
- (e) the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the matrimonial property;
- (f) any direct or indirect contribution made by one spouse to the career or career potential of the other spouse;
- (g) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the marriage;
- (h) the fact that a spouse has made:
 - (i) a substantial gift of property to a third party; or
 - (ii) a transfer of property to a third party other than a *bona fide* purchaser for value;
- (i) a previous distribution of matrimonial property between the spouses by gift or agreement or pursuant to an order of any court of competent jurisdiction made before or after the coming force of this Act;
- (j) a tax liability that may be incurred by a spouse as a result of the transfer or sale of matrimonial property or any order made by the court;
- (k) the fact that a spouse has dissipated matrimonial property;
- (l) subject to subsection 30(3), any benefit received or receivable by the surviving spouse as a result of the death of his spouse;
- (m) any maintenance payments payable for the support of a child;
- (n) interest of third parties in the matrimonial property;
- (o) any debts or liabilities of a spouse including debts paid during the course of the marriage;
- (p) the value of matrimonial property situated outside Saskatchewan;
- (q) any other relevant fact or circumstance;

the court is satisfied that it would be unfair and inequitable to make an equal distribution of matrimonial property or its value the court may:

- (r) refuse to order any distribution;
- (s) order that all the matrimonial property or its value be vested in one spouse; or
- (t) make any other order that it considers fair and equitable.

Sec. 22. Distribution of matrimonial home.

(1) Where a matrimonial home is a subject of an application for an order under subsection 21(1), the court shall, having regard to any tax liability, encumbrance or other debt or liability pertaining to the matrimonial home, distribute the matrimonial home or its value equally between the spouses except where the court is satisfied that it would be:

- (a) unfair and inequitable to do so, having regard only to any extraordinary circumstances; or
- (b) unfair and inequitable to the spouse who has custody of the children;

and in that case the court may:

- (c) refuse to order any distribution;
- (d) order that the entire matrimonial home or its value be vested in one spouse; or
- (e) order any distribution that it considers fair and equitable.

(2) More than one matrimonial home. Where there is more than one matrimonial home, the court may designate to which matrimonial home subsection (1) applies and any remaining matrimonial home shall be distributed in accordance with section 21.

Sec. 23. Property exempt from distribution.

(1) Where matrimonial property, other than a matrimonial home or household goods, is:

- (a) property acquired before the marriage by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefiting both spouses;

(b) property acquired before the marriage by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefiting both spouses;

(c) property owned by a spouse before the marriage;
the fair market value of that property at the time of the marriage is, subject to subsection (4), exempt from distribution under this Part.

(2) Property acquired by exchange. Property acquired as a result of an exchange of property mentioned in subsection (1) is, subject to subsection (4), exempt from distribution under this Part to the extent of the fair market value of the original property mentioned in subsection (1) at the time of the marriage.

(3) Other exempt property. Where matrimonial property, other than a matrimonial home or household goods, is:

- (a) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses;
- (b) money paid or payable under an insurance policy that is not paid or payable in respect of property, unless the proceeds are compensation for a loss to both spouses;
- (c) property acquired after a decree *nisi* of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
- (d) property acquired as a result of an exchange of property mentioned in this subsection;
- (e) appreciation on or income received from and property acquired by a spouse with the appreciation on or income received from property mentioned in this subsection;

it is, subject to subsection (4), exempt from distribution under this Part.

(4) Power of court to distribute exempt property. Where the court is satisfied that it would be unfair and inequitable to exempt property from distribution, the court may make any order that it considers fair and equitable with respect to the matrimonial property mentioned in this section.

(5) Matters to be considered. In making an order under this section, the court shall have regard to:

- (a) any of the matters mentioned in clauses 21(2)(a) to (p);
- (b) contributions in any form whatsoever made by the spouses to their relationship, children or property prior to their marriage;
- (c) a contribution, whether financial or in any other form whatsoever, made by a spouse directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation, management or use of property mentioned in this section;
- (d) the amount of other property available for distribution;
- (e) any other relevant fact or circumstance.

(6) Presumption. All matrimonial property is presumed to be shareable unless it is established to the satisfaction of the court that it is property mentioned in this section.

Sec. 24. Property dealt with in interspousal contract exempt.

(1) Notwithstanding any other provision of this Act, matrimonial property, including a matrimonial home and household goods, that is distributed or disposed of by an interspousal contract provides for possession, status or ownership, is exempt from distribution under this Part, unless at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair and, in that case, the court shall distribute the property or its value in accordance with the provisions of this Act as though there were no interspousal contract, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable.

(2) Property not dealt with in contract. Where the spouses have entered into an interspousal contract and where an application is made under this Act respecting matrimonial property that is not distributed or disposed of by the interspousal contract, that property shall be distributed in accordance with this Act as though there were no interspousal contract.

Sec. 25. Immoral or improper conduct.

For the purposes of making any determination under section 21, 22 or 23, no court shall have regard to immoral or improper conduct on the part of a spouse unless that conduct amounts to dissipation or has otherwise been substantially detrimental to the financial standing of one or both spouses.

NORTHWEST TERRITORIES
MATRIMONIAL PROPERTY ORDINANCE
R.O.N.W.T. 1974, c. M-7, as amended.

Sec. 2. Definition.

In this Ordinance

- (a) "disposition". "dispositon"
 - (i) means a disposition by act *inter vivos* that is required to be executed by the owner of the land disposed of, and
 - (ii) includes
 - (A) a transfer, agreement for sale, lease for more than three years or any other instrument intended to convey or transfer an interest in land,
 - (B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,
 - (C) a devise or other disposition made by will, and
 - (D) a mortgage by deposit of certificate of title or other mortgage that does not require the execution of a document;
- (b) "matrimonial property rights." "matrimonial property rights" means all rights given by this Ordinance to the spouse of a married person in respect of the residential and other property of the married person, and without restricting the generality of the foregoing includes
 - (i) the right to prevent disposition of residential property by withholding consent,
 - (ii) the right of action for damages against the married person if a disposition of residential property that results in the registration of the title in the name of any other person is made without consent,
 - (iii) the right to obtain payment from the Assurance Fund to an unsatisfied judgment against the married person in respect of a disposition of residential property that is made without consent and that results in the registration of the title in the name of any other person,
 - (iv) the right of the surviving spouse to a life estate in residential property of the deceased married person, and
 - (v) the right to the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under execution;
- (d) "residential property." "residential property" means a parcel of land
 - (i) on which a dwelling house occupied by the owner of the parcel as his residence or seasonal residence is situated, and
 - (ii) that consists of
 - (A) not more than four unadjoining lots in one block in a city, town or village as shown on a plan registered in the Land Titles Office, or
 - (B) not more than sixty-five hectares of land other than land in a city, town or village.

Sec. 28. Application to judge on questions re property.

(1) In any question between a husband and wife as the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife may apply in a summary way to a judge.

(2) Power of judge. Subject to any written agreement to the contrary, in an application under subsection (1) the judge is empowered to make such order with respect to the property in dispute as he considers fair and equitable including an order for one or more of the following:

- (a) the sale of the property or any part thereof and the division or settlement of the proceeds;
- (b) the partition or division of the property;
- (c) the vesting of property owned by one spouse in both spouses in common in such shares as he thinks fit;
- (d) the conversion of joint ownership into ownership in common in such shares as he thinks fit;
- (e) the transfer from one party to the other party or to a child of either or both parties of such property as he may specify; and may direct any inquiry or issue touching the matters in question to be made in such manner as he thinks fit and may make such order as to the costs of and consequent on the application as he thinks fit.

(3) Order of judge. Subject to the provisions of subsection (4) the judge may make such order under this section, whether affecting the title to property or otherwise, as he considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property is in any other way defined.

(4) Contributions of spouse. In considering an application under this section the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form whatsoever.

YUKON TERRITORY

MATRIMONIAL PROPERTY AND FAMILY SUPPORT ORDINANCE

O.Y.T. 1979 (2nd), c. 11, as amended.

Sec. 3. Contracts prevail.

Except as otherwise provided by this Ordinance, where a marriage contract or separation agreement makes provision in respect of a matter that is provided for in this Ordinance, the contract prevails.

(2) Jurisdiction of Court. Any provision in a domestic contract that purports to limit the jurisdiction of a court to determine the extent to which subsection (1) applies in respect of the contract is void.

(3) Rights in home. Notwithstanding any other provision of this Ordinance, any provision in a marriage contract that purports to limit the rights of a spouse under Part II is void.

(4) Undue influence. Notwithstanding subsection (1), where a court is satisfied in any proceedings under this Ordinance that a person has, through undue influence, secured the agreement of his spouse or a person with whom he is cohabiting to any provision in a contract or [sic] a court may decline to give effect to the provision for the benefit of the person who secured the agreement.

Sec. 4. Application of Ordinance.

(1) Parts I and II apply notwithstanding that,

- (a) the spouses entered into the marriage before this Ordinance comes into force;
- (b) the property in issue or the family home was acquired before this Ordinance comes into force; or
- (c) a proceeding to determine rights as between the spouses in respect of property or a family home has been commenced or adjudicated before this Ordinance comes into force.

Sec. 5. "family assets."

(1) In this Part, "family assets" means a family home as determined under Part II and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and includes

- (a) money in an account with a chartered bank, savings office, credit union or trust company where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes,
- (b) where property owned by a corporation, partnership or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property,
- (c) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of himself, if the property would be a family asset if it were owned by the spouse, and
- (d) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invoke or dispose of the property, if the property would be a family asset if it were owned by the spouse,

but does not include property that the spouses have agreed by a marriage contract or separation agreement is not to be included in the family assets.

Sec. 6. Purpose of Part.

(1) The purpose of this Part is to recognize that the law takes insufficient notice of the facts

- (a) that child care, household management and financial provision are the joint responsibilities of the spouses, and

(b) that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities,
and to rectify this deficiency by entitling each spouse to an equal division of family assets upon marriage breakdown, subject to the equitable considerations set out in sections 14 and 15.

Sec. 7. Division of assets.

(1) Where a marriage breakdown occurs, each spouse is entitled to have the family assets owned at the time of the breakdown by one spouse or both spouses divided in equal shares, notwithstanding the ownership of the assets by the spouses as determinable for other purposes.

(2) Marriage breakdown. A marriage breakdown shall be deemed to occur upon

- (a) the pronouncement of a decree *nisi* of divorce in respect of the marriage,
- (b) the pronouncement of a declaration that the marriage is a nullity,
- (c) the commencement of the parties to live separate and apart without reasonable prospect of the resumption of cohabitation, or
- (d) the making of an application by one of the spouses under this Ordinance for a division of family assets.

(3) Orders before breakdown. An order made under this Part before the breakdown of the marriage determining any question as between the spouses as to the ownership or right to possession of any particular property does not affect the rights of the spouses in that property under subsection (1) upon the breakdown of the marriage.

Sec. 8. Contribution of spouse.

(1) The contribution by one spouse of work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of property, other than family assets, in which the other spouse has or had an interest, shall be determined and assessed as if they were unmarried persons at all material times.

Sec. 9. Third party rights.

(1) Unless otherwise provided, the transfer of an interest in property, under paragraph 13(2)(d), or between spouses under this Ordinance by order of the Court or otherwise, does not affect the existing rights of other persons.

(2) Transfer by Court order. Where by order of the Court under this Part a transfer is made of the ownership or possession of property subject to a charge, notwithstanding the terms of any contract,

- (a) the transfer of ownership or possession shall not be treated as a breach of any contract;
- (b) the recipient spouse is entitled, upon giving notice of the transfer to the holder of the charge, to exercise any of the rights of the owning spouse in relation to the property or to the charge, including the right to receive notices;
- (c) upon the release of the charge, the recipient spouse is entitled to receive the entire interest of the owning spouse in the property, subject to the terms of the order; and
- (d) the performance by the holder of the charge of his obligations under the charge in a manner benefiting the recipient spouse is a sufficient discharge of his obligations under the charge to the owning spouse.

Sec. 10. Assignment of rights.

(1) Until judgment is obtained, the rights of a spouse under this Part are not assignable or subject to attachment.

Sec. 14. Unequal division.

(1) The Court may make a division of family assets resulting in shares that are not equal where the Court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to

- (a) any agreement other than a marriage contract or a separation agreement;
- (b) the duration of the period of cohabitation under the marriage;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when property was acquired;
- (e) the extent to which property was acquired by one spouse by inheritance or gift;
- (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.

Sec. 15. Non-family assets.

(1) The Court may make a division of any property owned by one spouse or both spouses that is not a family asset where

- (a) a spouse has unreasonably impoverished the family assets; or
- (b) the result of a division of the family assets would be inequitable in all the circumstances, having regard to,
 - (i) the considerations set out in paragraphs (a) to (h) [sic] of subsection 14(1), and
 - (ii) the effect of the assumption by one spouse of any of the responsibilities set out in section 6 on the ability of the other spouse to acquire, manage, maintain, operate or improve property that is not a family asset.